



2002

Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights

Shedrack C. Agbakwa

Follow this and additional works at: <https://digitalcommons.law.yale.edu/yhrdlj>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights*, 5 YALE HUM. RTS. & DEV. L.J. (2002).

Available at: <https://digitalcommons.law.yale.edu/yhrdlj/vol5/iss1/5>

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Human Rights and Development Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.

Article

Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights

Shedrack C. Agbakwa†

This Article argues that economic, social, and cultural rights are the key to effectively realizing human rights in Africa. It contends that human rights discourse on the indivisible bundle of rights must be put into practice in the African context, where these rights are people's primary means of self-defense. First, the Article argues that African governments' failure to enthrone enforceable socio-economic rights compromises civil and political rights. It then examines the inextricable link between these rights and development, arguing that there is no justification for discriminatory enforcement of human rights. The Article addresses factors inhibiting the realization of these rights. It highlights the broad consequences of the continued marginalization of socio-economic rights. Finally, it urges a rejection of the Western model and explores approaches to improve the fortunes of these rights. It concludes that selective enforcement of human rights in the context of worsening social, economic, civil, and political conditions is a heedless truncation of humanity.

† Doctoral Candidate & Harley D. Hallett Graduate Scholar, Osgoode Hall Law School, Toronto, Canada. LL.M. (Dalhousie) 2000; B.L. (Abuja) 1999; LL.B. (University of Nigeria) 1997; N.C.E. (Owerri) 1990. The research for this paper was made possible by generous LLM funding from The Sir Izaak Walton Killam Pre-Doctoral Fellowship, Dalhousie University in Halifax, Nova Scotia, Canada. I should like to thank Professors Hugh M. Kindred and Esmeralda Thornhill of Dalhousie Law School and Professors Obiora Chinedu Okafor and Craig M. Scott of Osgoode Hall Law School for their insightful comments on an earlier draft of this paper, and for the many ways in which they helped to refine the ideas presented in this paper. I am grateful to Solomon Ukhuegbe for his comments. My thanks to the editors of the *Yale Human Rights & Development Law Journal* for their very helpful comments. The usual disclaimers apply. This paper is dedicated to Nkiru and Chidalu (my wife and son).

A point very often missed in human rights praxis is that economic, social, and cultural rights (ESCR) "are the only means of self-defense for millions of impoverished and marginalized individuals and groups all over the world."¹ Despite the international rhetoric on the equal relevance, interdependence, and indivisibility of all human rights,² in practice states have paid less attention to the enforcement and implementation of ESCR, and their attendant impact on the quality of life and human dignity of the citizenry, than other rights.³ African states, still living with the nightmares of slavery and colonial exploitation, are perhaps unsurpassed in this dreamy, rhetorical exercise.

African states ought to take the lead in the enforcement of ESCR, given Africa's deplorable socio-economic conditions. They ought not to emulate the industrialized states of the North which can afford the luxury of hollow rhetoric in the implementation of ESCR. Regrettably, African states have so far failed to match their words with appropriate, sufficient action.⁴ Where African leaders have asserted the importance of satisfying ESCR as part of protecting other rights, some have done so with the intention of using this rhetoric as a ploy to suppress civil and political rights.⁵

1. Rolf Kunnemann, *A Coherent Approach to Human Rights*, 17 HUM. RTS. Q. 323, 332 (1995).

2. See, e.g., Afr. Charter Hum. Peoples' Rts., June 27, 1981, pmbl. para. 8, O.A.U. Doc. CAB/LEG/67/3/Rev. 5 (1982) [hereinafter Afr. Charter]; *Proclamation of Tehran, Final Act of the International Conference on Human Rights*, May 13, 1968, art. 13, U.N. Doc. A/CONF.32/41 (1968), reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS vol. 1 (2d part), at 51-54, U.N. Doc. ST/HR/1/Rev.5 (1994); *Vienna Declaration and Programme of Action*, June 25, 1993, U.N. World Conference on Human Rights in Vienna, U.N. Doc. A/CONF. 157/24 (1993), reprinted in 32 I.L.M. 1661 (1993); see also THE LIMBURG PRINCIPLES ON THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Jan. 8, 1987, princs. 2-3, U.N. ESCOR, Commission on Human Rights, 43d Sess., Agenda Item 8, U.N. Doc. E/CN.4/1987/17/Annex (1987), reprinted in 9 HUM. RTS. Q. 122, 123 (1987) (underscoring the indispensability of indivisibility and interdependence); *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, guideline 4, reprinted in 20 HUM. RTS. Q. 691 (1998) (reemphasizing equality, interdependence and indivisibility of all human rights). On interdependence generally, see Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 OSGOOD HALL L.J. 769 (1989).

3. See Noam Chomsky, *The United States and the Challenge of Relativity*, in HUMAN RIGHTS FIFTY YEARS ON: A REAPPRAISAL 24, 32-35 (Tony Evans ed., 1998); see also Scott Leckie, *The U.N. Committee on Economic, Social and Cultural Rights and the Right to Adequate Housing: Towards an Appropriate Approach*, 11 HUM. RTS. Q. 522, 525-26 (1989) (discussing the relative lack of state action in spite of numerous resolutions affirming the legal validity of ESCR and indivisibility of human rights).

4. This may in part be attributed to the prevailing unwillingness of the international community to match its high-minded rhetoric with commensurate actions. In fact, notwithstanding all pretensions to the contrary, there is evidence to support active undermining of the efforts of the developing countries to realize ESCR by the developed countries. See El Hadji Guissé, *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations*, U.N. Comm. Hum. Rts., 49th Sess., U.N. Doc. E/CN.4/Sub.2/1997/8 (1997), available at <http://www.derechos.org/nizkor/impu/guisse.html> (last visited Feb. 11, 2002).

5. In the past, repressive regimes in Africa (like Eyadema of Togo and Mobutu of Zaire) have claimed that they could not allow basic civil and political rights in their various states so long as there were prevailing economic hardships and the population remained underfed and economically underdeveloped. While it is true that economic development might lead to

Africa's worsening socio-economic conditions, and resulting exacerbation of civil and political strife coupled with the current lack of interest in the enforcement of ESCR,⁶ renders the effective realization of human rights on the continent a remote possibility. Even if largely unintended, the neglect of ESCR, a substantial part of an indivisible whole, has brought about this sad state of affairs. This Article contends that there is an urgent need for a change of attitude and a relocation of emphasis from neglect and discriminatory enforcement of human rights to respect and balanced, holistic enforcement. Given the prevailing socio-economic circumstances in Africa, ESCR remain the cardinal means of self-defense available to the majority of Africans.

Part I of this Article emphasizes the imperative of a holistic and non-discriminatory enforcement of all human rights in Africa and links the failure of African governments to safeguard the socio-economic rights of their citizens to the widespread incidence of civil and political strife. Part I contends that, in contemporary Africa, a government's legitimacy is largely a function of its ability to guarantee and protect the ESCR of its people.

In contrast to many scholars and commentators who have pointed to the under-development and acute economic crises of African states as the reasons behind the non-enforcement of ESCR,⁷ Part II contends that under-development and economic crises are hardly the whole story. It argues that recognition and enforcement of these rights catalyze development and are inextricable from it. Any quest for meaningful development ought to be predicated on the effective protection, enforcement, and realization of ESCR. While mindful of the poor economic conditions of many African states, Part II argues that these conditions do not justify outright non-enforcement of ESCR.

Part III discusses some factors militating against the realization of ESCR in Africa. Part IV highlights the consequences of the continued marginalization of these rights. In strategizing the way forward, Part V articulates alternative enforcement approaches that will ensure a non-discriminatory and more effective enforcement of ESCR. In Part VI, I shall offer a few concluding remarks.

The aim of this Article is not to analyze the various rights traditionally classified as ESCR. Rather, it seeks to question the marginalized enforcement of ESCR as codified in the African Charter (work, health,

the improvement of the civil and political rights as a result of improvement in the quality of life, it cannot be shown that the curtailment of the civil and political rights of the people can, in any way, contribute to the improvement of their socio-economic rights and development. Its only contribution is the preservation of the repressive regimes in question. On this and related issues, see Peter R. Baehr, *Concern for Development Aid and Fundamental Human Rights: The Dilemma as Faced by the Netherlands*, 4 HUM. RTS. Q. 39, 43-44 (1982); Rhoda Howard, *The Full-Belly Thesis: Should Economic Rights Take Priority Over Civil and Political Rights? Evidence from Sub-Saharan Africa*, 5 HUM. RTS. Q. 467, 468-78 (1983); Rhoda Howard, *The Dilemma of Human Rights in Sub-Saharan Africa*, 35 INT'L J. 724, 725 (1980).

6. See J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa*, 26 CAL. W. INT'L L.J. 1, 2 (1995).

7. See, e.g., R.M. D'sa, *The African Charter on Human and Peoples' Rights: Problems and Prospects for Regional Action*, 10 AUSTL. Y.B. INT'L L. 101, 114 (1987).

education, and cultural rights), including the “new rights,”⁸ such as access to the public services of one’s country, public property, and other services.⁹ The Charter does not *expressly* provide for housing or social security rights. But, except as otherwise indicated, this Article does not exclude these or other socio-economic rights from its purview. This Article focuses on the *collective* marginalization of ESCR, broadly construed. It focuses on particular ESCR merely to illustrate points.

I. THE IMPERATIVE OF A HOLISTIC APPROACH TO ENFORCEMENT

“Perils to the part imperil the whole.”¹⁰

In the 1993 Vienna Declaration,¹¹ the consensus opinion recognized the futility inherent in entrenching civil and political rights without the corresponding ESCR. This consensus emerged despite the bipolar (East-West) ideological differences, which then dominated international relations, and led to the implementation of the Universal Declaration of Human Rights (UDHR) by means of two international covenants, and continue to have grave implications for ESCR.¹² Long before the Vienna Declaration, the UDHR set the parameters for evaluating the legitimacy of governmental actions by codifying “the hopes of the oppressed, [and] supplying authoritative language to the semantics of their claims.”¹³ The euphoric “Never Again” declaration by the victorious powers after World War II was intended to encapsulate humanity’s resolve to banish human misery in all its ramifications, whether arising from physical abuse or from want.

If the purpose of government is to provide for the welfare and security of all citizens, governments fail to fulfill this purpose when they commit to enforcing only civil and political rights. Such an ostrich-like posture denies the various forms of state abuse against which the citizen must be

8. Chidi Odinkalu, *Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social, and Cultural Rights Under the African Charter on Human and Peoples’ Rights*, 23 HUM. RTS. Q. 327, 339 (2001).

9. See Afr. Charter, *supra*, note 2, art. 13.

10. Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples’ Rights*, 31 HOW. L.J. 643, 660 (1988).

11. *Vienna Declaration and Programme of Action*, *supra* note 2; see also Shadrack Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa*, 4 BUFF. HUM. RTS. L. REV. 79, 86-88 (1998) (discussing the Vienna Human Rights Conference and its outcome).

12. The ideological altercation that produced two covenants arguably confined ESCR to, in the words of one scholar, “human rights regime’s shabby second cousin.” See Krysti Justine Guest, *Exploitation Under Erasure: Economic, Social and Cultural Rights Engage Economic Globalization*, 19 ADEL. L. REV. 73, 82 (1997). For an overview of the history behind the two covenants, see Matthew Craven, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 1-16 (1995), and Peter Cumper, *Human Rights: History, Development and Classification*, in *HUMAN RIGHTS: AN AGENDA FOR THE 21ST CENTURY* 1, 6-7 (Angela Hegarty & Siobhan Leonard eds., 1999).

13. See Jose A. Lindgren Alves, *The Declaration of Human Rights in Postmodernity*, 22 HUM. RTS. Q. 478, 481 (2000).

protected: above all, the state's neglect of its citizens.¹⁴ Even opponents of enforceable ESCR recognize this axiom. The *de facto* commitments of many Western states to a welfare ethos¹⁵, despite their official opposition to ESCR, assures a high degree of compliance in protecting the rights of their citizens.¹⁶

Modern governments are active participants, not passive spectators, in events that fundamentally impact the ability of the people to lead a meaningful and dignified life.¹⁷ Governance ceases to be meaningful when the majority of the people is put in a situation where it cannot appreciate the value of life, let alone enjoy its benefits, and where it lacks the appropriate mechanisms to compel change. Where human survival needs frequently go unmet, as in Africa, protection of human rights ought to focus on "preventing governments from neglecting their citizens."¹⁸

A point that is often overlooked in contemporary human rights discourse and practice is that the greatest benefit of guaranteeing enforceable rights is the *assurance* it gives to people that effective mechanisms for adjudicating violations or threatened violations of their rights are available. As events in many parts of Africa have shown,¹⁹ the absence of such mechanisms gives the impression that resort to extra-legal means, such as armed rebellion, is the only way to improve one's condition or challenge governmental abuse and neglect.²⁰ Most current African

14. An example of the right to protection against state neglect is the case *Laxmi Kant v. Union of India*, (1987) 1 S.C.C. 67, in which the Indian Supreme Court held that the right of children to life and livelihood included the right to be protected by the state against emotional and material neglect.

15. It should, however, be pointed out that the *de facto* commitment to a welfare ethos has become a victim of globalization even in rich societies, where the dismantling of the institution of the welfare state is seen as a necessary step for the efficacy of state management. Thus, social exclusion and human misery are being transformed into a new economic ideology. See Alves, *supra* note 13, at 485.

16. See Richard Falk, *The Challenge of Genocide and Genocidal Politics in an Era of Globalisation*, in HUMAN RIGHTS IN GLOBAL POLITICS 177, 190 (Tim Dunne & Nicholas Wheeler eds., 1999); see also Jack Donnelly, *Human Rights, Democracy and Development*, 21 HUM. RTS. Q. 608, 629-30 (1999) (noting the use of the welfare system by all existing liberal democracies to compensate some of "those who fare less well in the market" and that this system "remains a powerful force in all existing liberal democratic regimes and a central source of their legitimacy").

17. See Abubakar Momoh & Said Adejumo, *THE NIGERIAN MILITARY AND THE CRISIS OF DEMOCRATIC TRANSITION: A STUDY IN THE MONOPOLY OF POWER* 211 (1999) (questioning the basis, rationale and justification for the existence of the state and its control over national wealth, and its overall responsibility where it fails to live up to its health, educational, employment and other social obligations to the people).

18. Carol M. Tucker, *Regional Human Rights in Europe and Africa: A Comparison*, 10 SYRACUSE J. INT'L L. & COM. 135, 162 (1983).

19. Notable examples are the internecine fratricidal conflicts involving different communities in Nigeria, such as the Niger Delta, Ife-Modekeke, and other religious-political conflicts in the northern parts of the country. Other examples are the fratricidal conflicts in Congo, Sierra Leone, and Liberia, as well as the unending conflicts in Somalia. See Segun Odunga, *Achieving Good Governance in Post-Conflict Situations: The Dialectic Between Conflict and Good Governance* 41, 42-49 in AFRICAN CONFLICTS, *infra* note 23.

20. This assertion holds true for all rights. Generally people tend to develop means of expressing their grievances. Where they are denied an organized avenue, such as the courts or other tribunals, they resort to extra-legal means. Essentially the gist of human rights has

conflicts consist of people who are fighting not against themselves but against poverty and governmental inaction in the face of destitution. This conflict usually is due to many years of impoverishing neglect and to the absence of other viable ways of compelling meaningful change. Because governments are increasingly expected to meet the basic needs of their citizens, there is a growing tendency to demand results in militant terms, particularly in the absence of a proper forum to compel governmental action.²¹ As Callisto Madavo, World Bank Vice President for the African region, observes, "Africa's wars are not driven . . . by ethnic differences. As elsewhere, they reflect poverty, lack of jobs and education, rich natural resources that tempt and sustain rebels, and [ineffective and insensitive] political systems"²²

These are, for the most part, socio-economic and political conflicts among ethnically differentiated peoples. Although holistic protection of all rights will not prevent every conflict, it will defuse the majority of conflicts that are triggered or sustained by those who exploit abject socio-economic conditions.²³ Scholars have demonstrated a causal link between these conflicts, which can be seen as a people's violent resistance to their deplorable socio-economic conditions,²⁴ and the absence of perceived modes of effecting a peaceful change. On the psychological level, it has been observed that:

[T]he gap between what a people expect as being just and fair and what they actually have can heighten a sense of unfair treatment and so develop a sense of deprivation. . . . Feelings of deprivation . . . provide fertile grounds for mobilizing opposition and the affected group with the real potential for collective violence and social instability. Economic, social and political

always revolved around maintaining a balance between the haves and the have-nots. Even the so-called civil and political rights, as a pseudonym for western liberalism, emerged in different forms. As Falk points out, they emerged "as a centrist compromise that offered enough to those currently disadvantaged to discourage recourse to revolution while providing essential stability for existing social and economic hierarchies." Falk, *supra* note 16, at 180. It is arguable that the denial of socio-economic rights in Africa has assumed revolutionary proportions akin to the pre-revolution denial of civil and political rights in Europe, thereby justifying similar empowerment.

21. See Richard Falk, *Responding to Severe Violations*, in *ENHANCING GLOBAL HUMAN RIGHTS* 205, 226 (Jorge I. Domínguez et al. eds., 1979).

22. See Callisto Madavo, *Stand Back and Take a More Positive Look at Africa*, *INT'L HERALD TRIB.* (Paris), June 6, 2000.

23. See Adebayo Adedeji, *Comprehending African Conflicts*, in *COMPREHENDING AND MASTERING AFRICAN CONFLICTS: THE SEARCH FOR SUSTAINABLE PEACE & GOOD GOVERNANCE* 10-12 (Adebayo Adedeji ed., 1999) [hereinafter *AFRICAN CONFLICTS*]; see generally *Report of the Secretary-General on the Causes of Conflict and Promotion of Durable Peace and Sustainable Development in Africa*, reprinted in 10 *AFR. J. INT'L & COMP. L.* 549, 549-53 (1998) (highlighting causes of conflicts in Africa).

24. See Will H. Moore et al., *Land Reform, Political Violence and Economic Inequality-Political Conflict Nexus: A Longitudinal Analysis*, 21 *INT'L INTERACTIONS* 335 (1996); Maro Ellina & Will H. Moore, *Discrimination and Political Violence: A Cross-National Study with Two Time Periods*, 43 *W. POL. Q.* 267, 268-71 (1990).

institutions that are perceived to have failed to address the conditions producing deprivation become victims of vicious campaigns that can lead to [violence].... [T]he fear of unemployment and the strain of reduced economic security in people's private lives can create tremendous anxiety and agitation. Psychologically, reactions to unemployment, especially when it is rising, and its attendant strain of reduced economic security may create fear, frustration and aggression.... Conceivably, the fear of social instability may increase the potential for violence.²⁵

This relationship between deprivation and conflict underscores the fundamental link between protection of human rights and stability. The intimate relation between stability and human rights, in turn, reinforces the necessity of guaranteeing the enforcement of all human rights without exception.²⁶ Since the different rights are interconnected and operate in support of each other, it logically follows that the full realization of one set remains dependent on the realization of the other.²⁷ In a state of instability resulting from the denial of basic ESCR, it becomes difficult, if not impossible, to realize civil and political rights, and *vice versa*.²⁸

Apart from the instability it causes, the non-realization of ESCR creates insurmountable obstacles to the enjoyment of civil and political rights. People can only be free from abuse and exploitation when they have what it takes to assert their rights and free themselves from exploitative rule. Because the majority of Africans are illiterate and poor, they lack the requisite knowledge and means to assert their rights, let alone enjoy them. As U. O. Umozurike observes:

A great impediment to the attainment of civil and political rights is constituted by illiteracy, ignorance and poverty. To the many rural

25. Al-Hassan Conteh et al., *Liberia*, in *AFRICAN CONFLICTS*, *supra* note 23, at 118-19.

26. The link between neglect of ESCR and instability is further underscored by the U.N. Secretary-General's eloquent testimony to the effect that unfulfilled basic needs constitute "the deepest causes of conflict." *Report of the Secretary-General on the Work of the Organization, An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping*, U.N. GAOR, at 4, U.N. Doc. A/47/277/S/24111 (1992), available at <http://www.un.org/Docs/SG/agpeace.html> (last visited Feb. 2, 2002).

27. See Pierre De Vos, *Pious Wishes or Directly Enforceable Human Rights?: Social and Economic Rights in South Africa's 1996 Constitution*, 13 S. AFR. J. HUM. RTS. 67, 71 (1997). De Vos further elucidates that "[s]tarving people may find it difficult to exercise their freedom of speech while a restriction of freedom of speech may make it difficult for individuals to enforce their right of access to housing." *Id.*

28. See *Copenhagen Declaration on Social Development and Programme of Action of the World Summit for Social Development*, at para. 5, U.N. Doc.A/CONF.166/9 (1995), available at [gopher://gopher.undp.org:70/00/unconfs/wssd/summit/off/a-9.en](http://gopher.undp.org:70/00/unconfs/wssd/summit/off/a-9.en) (last visited Feb. 2, 2002) ("[S]ocial development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms"); see also Wesley T. Milner et al., *Security Rights, Subsistence Rights, and Liberties: A Theoretical Survey of the Empirical Landscape*, 21 HUM. RTS. Q. 403, 413 (1999) (underscoring the inextricable link between abuses of personal integrity inherent in not being free from wants and violations of political liberties).

dwellers in any African state, and indeed to the urban poor, the lack of awareness or means make it impossible for them to assert their rights. They are very much at the mercy of their rulers.²⁹

Thus, even a society interested in protecting only civil and political rights should give equal priority to ESCR as a practical means to achieving the former.³⁰ An absence of the latter commitment deepens a collective feeling of injustice. The majority, comprised of the more vulnerable members of society, cannot but feel that it has been denied an accepted forum for the recognition and redress of injustices.³¹ Moreover, the non-enforcement of ESCR ridicules the so-called autonomy of the individual, a concept that is the linchpin of civil and political rights. Adequate socio-economic conditions must exist as a precondition to personal autonomy.³² As Joseph Raz illustrates:

A person whose every major decision was coerced, extracted from him by threats to his life or that of children, has not led an autonomous life. Similar considerations apply to a person who has spent the whole of his life fighting starvation and disease, and has no opportunity to accomplish anything other than to stay alive . . .³³

According to Raz, autonomy "affects wide-ranging aspects of social practices and institutions Almost all major social decisions and many of the considerations both for and against each one of them (whether civil and political rights or ESCR) bear on the possibility of personal autonomy, either instrumentally or inherently."³⁴

African states have not failed to recognize the dangers of a selective—as opposed to holistic—recognition of human dignity. The African Charter remains a testament to the collective recognition of the indivisibility of human rights and dignity. As parties to the Charter, African states

29. U.O. UMOZURIKE, *THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS* 41 (1997).

30. David Selby argues that "human rights do not stop at counting political prisoners any more than they stop at counting the unemployed. Human rights are about human needs—needs that extend from proper nutrition, clothing, shelter, health care and education to participating in decisions that frame our lives." R. R. Akankwasa, *Human Rights Education and the Quest for Development: The Case of Ugandan Schools*, 5 E. AFR. J. PEACE & HUM. RTS. 105, 108 (1999) (quoting DAVID SELBY, *HUMAN RIGHTS* 77 (1987)).

31. The discovery of injustice as such depends upon, and is aggravated by, the feeling that one has rights that are not being respected. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 833 (1988). The feeling of injustice is heightened when those who are making excuses of lack of resources for non-recognition of the people's rights are unabashedly flaunting the wealth amassed from their concerted fleeing of the people.

32. See Daniel Warner, *An Ethics of Human Rights: Two Interrelated Misunderstandings*, 24 DENV. J. INT'L L. & POL'Y 395, 411 (1996).

33. Joseph Raz, *Rights-Based Moralities*, in *THEORIES OF RIGHTS* 182, 192 (Jeremy Waldron ed., 1984).

34. *Id.* at 193.

apparently appreciate the necessity of a holistic approach to enforcement. While this must be pursued at the international and regional levels—as the African Charter seeks to do—the *locus* of active enforcement must be the domestic arena where the mechanisms of enforcement will be within easy reach of aggrieved citizens and thus more widely utilized.³⁵ Moreover, international protection or mechanisms are designed to complement the domestic protection of human rights.³⁶ As Theo van Boven persuasively argues, international procedures “can never be considered as substitutes for national mechanisms and national measures with the aim to give effect to human rights standards. Human rights have to be implemented first and foremost at national levels.”³⁷

Anything short of a holistic enforcement of human rights at the domestic level belies the African Charter’s recognition that “the satisfaction of economic, social and cultural rights is a *guarantee* for the enjoyment of civil and political rights.”³⁸

Bifurcated enforcement is not in keeping with the virtues of Africa’s historical tradition and the values of African civilization, which are among the founding philosophies of the Charter.³⁹ African states subscribed to a Charter that acknowledges the importance traditionally attached to these rights, and, therefore, ought to do more than pay them lip service.

Rather than the existing approach to enforcement, which marginalizes ESCR, action should be taken across the board to ensure a minimum level of enjoyment of all human rights. As argued in the next section, the excuse of impossibility of performance due to underdevelopment, often put forward by African leaders and some scholars,⁴⁰ does not represent the whole truth. It is too often a rationalization for a lack of political will and the continued elevation of luxury over necessity.

II. RIGHTS AND THE ARGUMENT OF DEVELOPMENT

The point is often made that development⁴¹ of Africa, and indeed of all

35. See Roman Wieruszewski, *National Implementation of Human Rights*, in HUMAN RIGHTS IN A CHANGING EAST-WEST PERSPECTIVE 264, 279-84, (Allan Rosas & Jan Helgesen eds., 1990) (discussing the importance of judicial remedy for the national implementation of human rights).

36. See Allan Rosas & Martin Schenin, *Implementation, Mechanisms and Remedies*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 355, 379 (Asbjorn Eide et al. eds., 1995).

37. Theo van Boven, *The International System of Human Rights: An Overview*, in MANUAL ON HUMAN RIGHTS REPORTING, at 10, U.N. Doc. HR/PUB/91/1, U.N. Sales No. GV.97.0.16 (1997); see also Claude E. Welch, Jr., *The African Commission on Human and Peoples’ Rights: A Five-Year Report and Assessment*, 14 HUM. RTS. Q. 43, 57-58 (1992) (arguing that enforcement of human rights depends on state action).

38. See Afr. Charter, *supra* note 2, at pmbl., ¶ 8 (emphasis added).

39. See *id.* ¶ 5.

40. See, e.g., Umozurike, *supra* note 29, at 111.

41. The term “development” (a concept with varying and diverse definitions, long considered synonymous, and used interchangeably, with the terms “growth” and “economic development”) is “often equated with economic development, usually measured as economic growth, improved balance of payment, and other macroeconomic variables.” Sigrun I. Skogly,

Third World states, is a necessary precondition for the enforcement and enjoyment of ESCR.⁴² It has been contended that African states cannot reasonably be expected to fulfill their ESCR obligations under the African Charter given their socio-economic problems, which arise from underdevelopment and "existing patterns of international trade."⁴³ Scholars have also asserted that the poverty of African states⁴⁴ justifies treating ESCR as principles of state policy⁴⁵ (as they are in the constitutions of Nigeria, Cameroon, Lesotho, Liberia, Malawi, Namibia, Sierra Leone, and

Structural Adjustment and Development: Human Rights – An Agenda for Change, 15 HUM. RTS. Q. 751, 752-53 (1993); see also Theo Van Boven, *Human Rights and Development: The U.N. Experience*, in HUMAN RIGHTS AND DEVELOPMENT: INTERNATIONAL VIEWS 121, 125 (David P. Forsythe ed., 1989). Consequently, a country's gross national product (GNP) per capita is usually, if erroneously, used to determine its level of development, and it is generally believed that economic development guarantees automatic improvement in other sectors and segments of society. Yet, as Milner, Poe & Leblang convincingly argued, the use of GDP or GNP variables to measure economic development does not "take into account economic inequality among citizens" and "can sometimes mask the true underlying extent of development" since "a country could have a high overall per capita GDP but also have a majority of the population living in poverty." Milner et al., *supra* note 28, at 411; see also Danilo Turk, *Development and Human Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 167, 167-73 (Louis Henkin & John L. Hargrove eds., 1994) (expressing a view similar to Milner's). A more appropriate and acceptable definition of development is one that transcends purely economic factors, as in the U.N. Declaration of the Right to Development, which defines development in the second paragraph of its preamble as "a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom." *United Nations Declaration on the Right to Development*, reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS vol. 1 (2d part), at 548, U.N. Doc. ST/HR/1/Rev.5 (1994). On the interface of human rights and development, see Brigitte Hamm, *A Human Rights Approach to Development*, 23 HUM. RTS. Q. 1005, 1010 (2001); N.J. Udombana, *The Third World and the Right to Development: Agenda for the Next Millennium*, 22 HUM. RTS. Q. 753, 755-57 (2000); and Theo Van Boven, *supra*, at 126-27.

42. See Baehr, *supra* note 5, at 43. Sometimes this point assumes an ambivalent dimension with repressive regimes arguing that they cannot allow basic civil and political rights in their states as long as the population is underfed and economically underdeveloped. The implication is that the satisfaction of civil and political rights is also dependent on economic development.

43. See D'Sa, *supra* note 7, at 114 (internal citations omitted).

44. Minasse Haile, *Human Rights in Africa: Observations on the Implication of Economic Priority*, 19 VAND. J. TRANSNAT'L L. 299, 300-01 (1986); see also Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22 VA. J. INT'L L. 667, 687 (1982) (asserting that the realities of African economic development render ESCR merely "promotional and not protective."); U.O. Umozurike, *The Significance of the African Charter on Human and Peoples' Rights*, in PERSPECTIVES ON HUMAN RIGHTS 44, 48 (Awa U. Kalu & Yemi Osinbajo eds., 1992) (claiming that African states cannot guarantee a right to work).

45. UMOZURIKE, *supra* note 29, at 110. Indeed there are a number of studies demonstrating that economic development has a strong, positive impact on the fulfillment of basic human needs. Han Park has revealed that economic development is the strongest predictor of improved basic needs achievement. Han S. Park, *Correlates of Human Rights: Global Tendencies*, 9 HUM. RTS. Q. 405, 410-13 (1987); see also Bruce E. Moon & William J. Dixon, *Politics, the State, and Basic Human Needs: A Cross National Study*, 29 AMER. J. POL. SCI. 661, 689-90 (1985). While economic development may be the strongest predictor of the ability to fulfill basic needs, it does not follow that basic needs are actually met, as events in the industrialized countries have shown. See Noam Chomsky, *supra* note 3, at 33-40.

Tanzania).⁴⁶

African states are, no doubt, among the most impoverished states of the world. This fact makes the argument that they are too poor to realize ESCR very compelling. However, these oft-invoked arguments usually proceed from two interrelated yet erroneous and misleading suppositions. First, they presuppose that ESCR are resource-intensive and require the direct intervention of governments, whereas civil and political rights do not involve government expenditure but merely entail the government's forbearance from interfering with the rights of the people.⁴⁷ Second, they presuppose that African states' underdevelopment is enough to justify non-enforcement of ESCR but not civil and political rights.

The African Charter does not impose separate or more onerous obligations on States Parties with respect to ESCR.⁴⁸ The Charter's provisions on these rights are modest. The right to an education, for instance, does not impose a more resource-intensive obligation than the right to a fair trial. Should a state then be justified in not providing necessary medical or educational facilities, but not in failing to provide the

46. See CAMEROON CONST. (1972-1996); LESOTHO CONST. (1993); LIBER. CONST. (1984); MALAWI CONST. (1994); NAMIB. CONST. (1990); NIG. CONST. (Constitution of the Federal Republic of Nigeria 1999); SIERRA LEONE CONST. (1991). The Constitutions of Ethiopia (1996), Ghana (1979), Somalia (1979), and Uganda (1995) also contain declaratory socio-economic rights, while the constitutions of Comoros (1992), Cote D'Ivoire (1990), Djibouti (1992), The Gambia (1987), Mauritania (1991), Togo (1992), Zambia (1991), and Zimbabwe (1980-2000), do not contain social rights provisions at all. I am grateful to Solomon Ukhuegbe for calling my attention to and supplying the foregoing information.

47. See Marc Bossuyt, *La distinction entre les droits civils et politiques et les droits économiques, sociaux et culturels*, 8 HUM. RTS. J. 783 (1975) (arguing that civil and political rights require non-interference on the part of the state (in the sense of being cost-free) while ESCR require active intervention by the state (in the sense of being cost-intensive)); E.W. Vierdag, *The Nature of Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 103 (1978) (asserting that because ESCR are resource-intensive, their implementation should properly be a political matter and not a matter of law or rights); see also D. M. Davis, *The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475, 478 (1992) (arguing that a social or economic right imposes a duty upon the state to provide certain resources, unlike civil and political rights that require a mere 'non-interference' from the state). These sources suffer from inherent non-recognition of the true cost implications of protecting civil and political rights. In *Re: Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC) at 1289, ¶¶ E-F, the South African Constitutional Court, in response to the claim that the enforcement of socio-economic (as opposed to civil and political) rights must be dependent on the capacity of a state to afford the cost, stated:

It is true that the inclusion of socio-economic rights may result in courts making orders that have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who were formerly not beneficiaries of such benefits.

Id. For a more detailed rebuttal of the resource intensive argument, see Shedrack C. Agbakwa, *Retrieving the Rejected Stone: Rethinking the Marginalization of Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights* 45-56 (2000) (unpublished LL.M. Thesis, Dalhousie Law School) (on file with author).

48. See Carlson Anyangwe, *Obligations of States Parties to the African Charter on Human and Peoples' Rights*, 10 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 625, 642 (1998).

necessary machinery for law enforcement, fair trials, or dignified prison conditions?⁴⁹

If the reason for marginalizing the enforcement of ESCR is a lack of development, how does the state intend to develop if the overwhelming majority of its citizens remains illiterate? A report to U.N.E.S.C.O. underscores that “[n]ational development hinges on the ability of working populations to handle complex technologies and to demonstrate inventiveness and adaptability, qualities that depend to a great extent on the level of initial education.”⁵⁰ Accordingly, the realization of the right to education and other ESCR are, as Hercules Booyesen observes, “a prerequisite for the creation of wealth”⁵¹ and, as such, a necessary precondition of development.⁵²

Even if under-development is such a potent factor, it merely affects the extent to which these rights can be realized and does not justify outright non-enforcement. Under-development does not justify partial enforcement any more than poverty justifies parents consistently feeding one child to the neglect of their other children. In any case, it is well-known that, but

49. One scholar argues forcefully that:

If judges decide that no one may be imprisoned without fair trial, and therefore that an order of habeas corpus must issue to secure the release of a person detained without trial, the effect is to burden the state with massive costs of a criminal justice system. The effect is to require the state to pay the salaries of judges, prosecutors and their administrative staff, to build court houses, and much more. . . . It is true, of course, that judicial protection of personal liberty does not expressly compel the state to commit resources. The state could instead refrain from prosecuting; but that would put it in breach of its duty to maintain peaceful order, and in a prospering society this option is in any event not a real possibility. Judicial protection of personal liberty consequently makes considerable expenditure inevitable.

Etienne Mureinik, *Beyond A Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 466 (1992); see also J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?*, 6 BUFF. HUM. RTS. L. REV. 39, 57 (2000) (arguing that “certain obligations with respect to the realization of the rights such as education, health, and shelter cannot simply be evaded by the state, irrespective of the question of resources or financial ability”).

50. See REPORT TO U.N.E.S.C.O. OF THE INTERNATIONAL COMMISSION ON EDUCATION FOR THE TWENTY-FIRST CENTURY: THE TREASURE WITHIN (Odile Jacob ed., 1996), quoted in Mustapha Mehedi, *The Realization of Economic, Social and Cultural Rights: The Realization of the Right to Education, Including Education in Human Rights*, Working Paper Presented to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 50th Sess., U.N. Doc. E/C.N.4/Sub.2/1998/10 (1998), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame1d70ebdbb5988e7c1802566420051e693?Opendocument> (last visited Feb. 2, 2002); see also Henry J. Steiner, *Social Rights and Economic Development: Converging Discourses?*, 4 BUFF. HUM. RTS. L. REV. 25, 37 (1998).

51. Hercules Booyesen, *The Dilemma of International Economic Human Rights: Their Improvement Through an Integrated System Approach*, 23 S. AFR. Y.B. INT’L L. 93, 109 (1998); see also Hans-Otto Sano, *Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development*, 22 HUM. RTS. Q. 734, 749 (2000) (positing that ESCR are most relevant to the target groups of development); Van Boven, *supra* note 41, at 127 (noting that “human rights is an ingredient of the development process”).

52. This much is implied in art. 1(1) of the U.N. General Assembly *Declaration on the Right to Development*, *supra* note 41. See Skogly, *supra* note 41, at 753-54.

for the poor administration and kleptomaniacal tendencies of their rulers, many African states might have attained a level where basic survival needs are met.⁵³ As it is, most African rulers are richer than their states⁵⁴ and continue to squander available resources. Thus, "it is not [necessarily] scarcity (of resources) which is the first problem, but maldistribution"⁵⁵ or inequitable "allocation of resources . . . [and] provision of government controlled benefits."⁵⁶ As Richard Falk argues, "[available] research strongly suggests that most Third World countries possess the resources to eliminate poverty and satisfy basic human needs if their policy makers were so inclined."⁵⁷

Although Richard Falk's point may be overstated (even rich Western countries have not eliminated poverty in spite of their huge resources), its import is instructive. The commonly asserted under-development of African states is not "something akin to an original state of nature."⁵⁸ Conditions in many African states today arise not out of a lack of wherewithal to satisfy the socio-economic rights of the people to a minimum of human dignity. Rather, they are partly the direct consequence of an active process of impoverishment⁵⁹ and de-development. In some cases, international loans and grants purportedly secured to provide essential facilities have ended up lining private pockets, securing safe nests for the advantaged class or being spent to protect that class from the ire of the dispossessed, all in the name of development and security.⁶⁰ It is

53. Basic survival needs in this context "refer[] to the minimum requirements for sustaining physical life, that is, health, food, housing, clothing, work, literacy." Richard Falk, *supra* note 21, at 225; see also Frances Stewart, *Basic Needs Strategies, Human Rights, and the Right to Development*, 11 HUM. RTS. Q. 347, 351 (1989).

54. One scholar writes that the late Mobutu Sese Sekou wa Zabanga of Zaire (now Democratic Republic of Congo) "is believed to have amassed a fortune far in excess of his country's national debt, bankrupting what must be one of the richest nations on the continent." Onyango, *supra* note 6, at 3. Zaire (DRC) has a host of mineral riches, including extensive reserves of gold, diamond, copper, cobalt, and zinc.

55. Tucker, *supra* note 18, at 162, n.226.

56. Minasse Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality*, 24 VA. J. INT'L L. 575, 578 (1984). There is a widespread tendency among many governments particularly in developing countries not to make the best available use of resources for improving the general living conditions of their people. See Yoko Yokota, *Reflections on the Future of Economic, Social and Cultural Rights*, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 201, 215 (Burns H. Weston & Stephen P. Marks eds., 1999) ("Instead, they often misallocate their scarce resources for unnecessarily large military expenditure and personal luxury, and waste them also by corrupt practices.").

57. See Falk, *supra* note 21, at 225; see also Graciela Chichilnisky, *Development Patterns and the International Order*, 31 J. INT'L AFF. 275 (1977); U.N.D.P., HUMAN DEVELOPMENT REPORT 1990, at 4 (1990) (stating that "[d]eveloping countries are not too poor to pay for human development and take care of economic growth," and listing some factors—including disoriented national priorities, debt repayments, very high military spending, inefficient parastatals, and unnecessary government controls—inhibiting the realization of human development in developing countries).

58. George Kent, *Globalization and Food Security in Africa*, at <http://www2.hawaii.edu/~kent/globaFeb99.html> (last visited Feb. 2, 2002).

59. *Id.*

60. For these reasons, Skogly, *supra* note 41, at 753, relying on U.N.D.P., *supra* note 57, at 128-60, writes, "It is now widely recognized that assistance towards economic development

unconscionable for those who participate in the squandering of developmental opportunities to point to the conditions they create as grounds for marginalizing enforcement of ESCR.

If an enforceable system of ESCR had been in place, it might have provided an opportunity to challenge the government's priorities and to hold it accountable for the expenditure of international loans. The Nigerian government recently awarded a \$350 million contract (with another \$6 million paid to foreign consultants) for an Olympic-size stadium in Abuja.⁶¹ During the same period, resident doctors and university teachers across the country were on a prolonged strike over irregular or non-payment of salaries and allowances.⁶² The government's priorities seem highly questionable for a country with more than five world-class stadiums and an infrastructure (water supplies, electricity, health facilities and schools) in shambles.⁶³ Under a regime of enforceable ESCR, the money for the stadium project might have been directed to health care, education or the acute housing shortage in the capital city, where it would have made a significant difference.

Under a robust regime of ESCR, accountability for such expenditures would likely improve policies and the quality of governance. As Etienne Mureinik argues:

a decision maker who is aware in advance of the risk of being required to justify a decision will always consider it more closely than if there were no risk. A decision maker alive to that risk is under pressure consciously to consider and meet all the objections, consciously to consider and thoughtfully to discard all the alternatives, to the decision contemplated. And if in court the government could not offer a plausible justification for the programme that it had chosen . . . then the programme would have to be struck down.⁶⁴

does not necessarily improve income distribution, education, or health for the majority of people in Africa."

61. See Samuel Udeala, *NLC Faults FG over N38bn Abuja Stadium Contract*, VANGUARD (Lagos), July 19, 2001, at <http://www.vanguardngr.com/news/articles/2001/July/19072001/b1190701.htm> (last visited Feb. 2, 2002).

62. See Rotimi Ajayi, *FG Moves To End Doctors' Strike*, VANGUARD (Lagos), June 14, 2001, at <http://www.vanguardngr.com/news/articles/2001/june/14/national10614111651.htm> (last visited Feb. 2, 2002).

63. See Karl Maier, *Nigeria: Hope After 40 Years*, B.B.C. NEWS ONLINE, Oct. 1, 2000, at http://news.bbc.co.uk/hi/english/world/africa/newsid_949000/949021.stm (last visited Feb. 2, 2002); see also U.N. Comm. on ESCR, *Concluding Observations on the Report of Nigeria*, at para. 28, U.N. Doc. E/C.12/1/Add.23 (1998) (noting with concern "that gross under-funding and inadequate management of health services led during the last decade to rapid deterioration of health infrastructures in hospitals.").

64. Mureinik, *supra* note 49, at 471-72. According to Mureinik, the court might intervene to quash legislation that created fourteen departments of health if it found multiple bureaucracies to be a senseless squandering of precious resources. The court might also intervene "if the annual Budget appropriated funds to build a replica of St. Peter's, [as

In this sense, the lack of an enforceable regime of ESCR may itself impede development. A government that is not required to justify its socio-economic policies and priorities is not likely to develop a consistent policy that encourages wise investments and conserves resources necessary for sustainable development.

One cannot deny the reality of Africa's grim economic situation, which remains a significant constraint on the financial abilities of African states. Although blame is often placed on this economic situation, the lack of political will and the corruption of the ruling elite have also played a large role in preventing an equal emphasis on enforcement of ESCR as of civil and political rights. Where African states have taken steps to enforce ESCR, they have not been negatively affected by it. The introduction of a regime of judicially enforceable ESCR in South Africa⁶⁵ has not paralyzed the state developmentally.⁶⁶ Yet, South Africa is not endowed with vastly greater resources than some African states with non-enforceable ESCR.

Enforcing ESCR can lead to social and political stability. Two recent South African decisions on ESCR⁶⁷ may have averted a breakdown in law and order that could have led to land invasions (occupations) like those in Zimbabwe—a result that would have threatened investment and development.

Under-development has not affected "[s]ervices which are of concern to the richer and more powerful sections of the society—such as . . . prestige development projects,"⁶⁸ nor induced cuts in military spending.⁶⁹ The fact that governments pour money into such projects makes it clear that underdevelopment is a smokescreen for a lack of political will to enforce ESCR.

Rather than blaming the existing lack of development for non-

Houphet Boigny of Cote d'Ivoire did], or perhaps a nuclear submarine before the rights of education promised by the constitution had been delivered." *Id.* at 472.

65. The Bill of Rights of the South African Constitution provides for justiciable ESCR, including rights to housing, health care, food, water, social security, education, a safe environment, and the right to form, join, and maintain cultural, religious and linguistic associations, as well as children's rights to basic nutrition, shelter, health care and social services. S. AFR. CONST. (1996), §§ 24, 26-29, 31.

66. The point here is not that the existence of justiciable ESCR, by itself, necessarily guarantees their automatic enjoyment or that the courts will deliver these rights in every case. As in *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SALR 765 (CC), the courts may still be reluctant to grant every prayer. In *Soobramoney*, the Court declined to compel the provision of dialysis treatment for a sick patient because of the state's insufficient resources. Nevertheless, the availability of judicial review (or other independent review) can be a significant weapon in the hands of the oppressed and may provide occasions for appropriate judicial intervention. See, for example, the landmark *Grootboom v. Oostenberg Municipality* 2000 (3) BCLR 277 (SA) and its analysis by Craig Scott & Philip Alston in *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise*, 16 S. AFR. J. HUM. RTS. 206 (2000).

67. See *South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC); *Minister of Public Works v. Kyalami Ridge Environmental Association*, 2001 (7) BCLR 652 (CC).

68. See U.N.I.C.E.F., *THE STATE OF THE WORLD'S CHILDREN* 16 (1989); see also Akankwasa, *supra* note 30, at 113 (describing the Ugandan government's eviction of "peasants" from their land to make way for a prestigious national park project).

69. See U.N.D.P., *supra* note 57, at 4.

enforcement of ESCR, responsible leaders should address the other, more dominant obstacles to the realization of ESCR in Africa. Some of these obstacles also prevent future development and underlie the under-development critique. The next section discusses some of these factors.

III. IMPEDIMENTS TO THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The obstacles to the realization and enforcement of ESCR under the African Charter include a combination of internal, textual factors and external, contextual factors. The internal factors stem from the normative flaws of the Charter's provisions on ESCR. The external factors include the host of political, economic and historical forces that prevent States Parties from fulfilling their ESCR obligations under the Charter. This article does not attempt to address comprehensively all the impediments to enforcement of ESCR in Africa. Many important factors—such as the effects of the Cold War,⁷⁰ slavery and colonialism⁷¹—are mentioned either briefly or not at all in favor of focusing on more recent, less developed factors.

A. Content and Scope of African Charter Provisions on Economic, Social and Cultural Rights

The normative inadequacies of the African Charter, particularly the provisions on ESCR, are well-known.⁷²

One serious obstacle to the enforcement of the Charter's provisions on ESCR is their lack of conceptual clarity. The Charter's failure to define ESCR adequately is not unique among international instruments. Nonetheless, the vagueness of ESCR makes enforcement quite difficult.⁷³

70. For a brief insight into the atrocities of the Cold War, see Adebayo Adedeji, *Comprehending African Conflicts*, *supra* note 23, at 9-10.

71. The role of slavery and colonialism in the economic exploitation and cultural domination of Africa has been sufficiently set out elsewhere. See generally WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* (1981); WALTER RODNEY, *WEST AFRICA AND THE ATLANTIC SLAVE TRADE* (1967); Adam Hochschild, *KING LEOPOLD'S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA* (1998); PHILIP CURTIN, *DEATH BY MIGRATION: EUROPE'S ENCOUNTER WITH THE TROPICAL WORLD IN THE 19TH CENTURY* (1989).

72. See generally Makau Mutua, *The African Human Rights Court: A Two Legged Stool?*, 21 HUM. RTS. Q. 342 (1999); Makau wa Mutua, *The African Human Rights System in a Comparative Perspective*, 3 REV. AFR. COMM. HUM. & PEOPLES' RTS. 5 (1993); Onyango, *supra* note 6, at 51; D'Sa, *supra* note 7, at 113-15; George W. Mugwanya, *Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating the African System*, 10 IND. INT'L & COMP. L. REV. 35 (1999); Wolfgang Benedek, *The African Charter and Commission on Human and Peoples' Rights: How to Make it More Effective*, 11 NETH. Q. HUM. RTS. 25 (1993).

73. See BRIGIT C. A. TOEBES, *THE RIGHT TO HEALTH AS A HUMAN RIGHT IN INTERNATIONAL LAW* 6 (1999); Yokota, *supra* note 56, at 205-06; Brigit Toebes, *Towards an Improved Understanding of the International Human Right to Health*, 21 HUM. RTS. Q. 661, 661-62 (1999); Mario Gomez, *Social Economic Rights and Human Rights Commission*, 17 HUM. RTS. Q. 155, 161 (1995).

The Charter's provision on the right to health⁷⁴ is typical. It entitles individuals to enjoy "the best attainable state of physical and mental health" without prescribing the standard of health⁷⁵ or defining what is meant by "the best attainable state." Given this ambiguity, the Charter's right to health depends on how a state construes it. A reasonable interpretation is that it imposes an unlimited obligation to provide free medical services, which leads to the frustrating conclusion that "[e]ven if governments employ the services of modern doctors as well as traditional healers, it seems quite impossible for them to carry out the obligation."⁷⁶ The provision's ambiguity allows states to avoid this interpretation. For both the individual and the state, the provision provides little guidance as to the state's obligation and the individual's appropriate expectations. As with its correlate in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Charter's right to health needs to be better defined.⁷⁷

B. Lack of Effective Enforcement and Promotion

The absence of effective promotion and enforcement at the agency level also impedes the realization of ESCR under the Charter. The vagueness problem discussed in the section above might have been alleviated through an African agency's better enforcement or promotion of ESCR. However, this has not happened until recently. After a long period during which the African Commission did not bother with ESCR⁷⁸, it appears to be gradually changing its attitude.⁷⁹ Yet, as Makau Mutua

74. "(1) Every individual shall have the right to enjoy the best attainable state of physical and mental health; (2) State Parties to the present Charter shall take necessary measures to protect the health of their people and ensure that they receive medical attention when they are sick." Afr. Charter, *supra* note 2, art. 16.

75. Umozurike, *supra* note 44, at 48.

76. *Id.*

77. See International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966). For an attempt to clarify the scope and implications of the right to health under the ICESCR, see Toebes, *supra* note 73. Gomez, *supra* note 73, at 161, argues that "[g]iving clarity and content to these standards [or rights] is one of the major tasks awaiting the human rights movement." Similar ambiguities surround other ESCR provisions of the Charter. The right to education under article 17(1) is ambiguous. It provides that, "Every individual shall have the right to education." The right to work under article 15 entitles individuals to "work under equitable and satisfactory conditions" and to "receive equal pay for equal work." The ambiguity allows States Parties to deny any obligation to provide jobs, to initiate measures to create jobs, or to recognize any rights of the unemployed.

78. In 1988, shortly after the Commission came into being, former Chairman Umozurike disclosed that the Commission had decided to concentrate on civil and political rights. He claimed that the Commission would be overwhelmed with cases if it attempted to make ESCR an immediate priority. See U. Oji Umozurike, *The Protection of Human Rights Under the African Charter on Human and Peoples' Rights*, 1 AFR. J. INT'L L. 62, 81 (1988).

79. The Commission has dealt with ESCR in several recent communications. See Pagnouille (on behalf of Mazou) v. Cameroon, Communication No. 39/90 (1997), reported in 6 HUM. RTS. REP. 819 (1999) (holding that the failure of Cameroon to reinstate Mazou, a magistrate, who had been unlawfully detained and removed from his former position,

notes, the Commission's decisions and pronouncements have been merely "formulaic": they "do not reference jurisprudence from national and international tribunals; nor do they fire the imagination."⁸⁰ Chidi Odinkalu asserts that the Commission has been successfully addressing the deficiencies of the Charter "through its practice, evolving procedures, and jurisprudence."⁸¹ When it comes to ESCR provisions, it is difficult to accept this assertion without some skepticism. The Commission has yet to address the Charter's ESCR-related normative deficiencies in any significant way. The Commission cannot be wholly dismissed "as a worthless institution."⁸² It certainly is not. The Commission has commendably earned itself a place in the international human rights firmament. Yet, as far as ESCR is concerned, the Commission, although not entirely a sham, is still much less than a savior.

Both in promotion and enforcement, the Commission has concentrated its efforts mainly on civil and political rights to the detriment of ESCR. In fairness to the Commission, it can only entertain cases brought before it. The Commission does not have a mandate to be a knight errant in shining armor initiating cases on behalf of helpless victims. However, one of its primary mandates, as stipulated in Article 45(1)(a) of the Charter, is to "undertake studies and researches on African problems in the field of human and peoples' rights, organize seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights"⁸³ The dearth of cases on ESCR is due in part to the Commission's inadequate efforts to encourage such cases and to educate and sensitize people as to their rights. Given its broad mandate, the Commission has a responsibility to ensure respect and observance of provisions of the Charter, without exception. If the

constituted a violation of the right to work under article 15 of the Charter); *Media Rights Agenda v. Nigeria*, Communication Nos. 105/93, 128/94, 130/94 and 152/96 (1998), reported in 7 INT'L HUM. RTS. REP. 265 (2000) (consolidating various cases against the Nigerian government and holding that denying a detainee access to doctors while his health deteriorates violates the right to health), available at <http://www1.umn.edu/humanrts/africa/12thannex5.html> (last visited Feb. 2, 2002); *International Pen v. Nigeria*, Communication Nos. 137/94, 139/94, 154/96 and 161/97 (1998), reported in 7 INT'L HUM. RTS. REP. 274 (2000) (consolidating several cases brought before the Commission concerning Ken Saro-Wiwa and co-defendants and holding that the Charter requires State Parties to provide detainees access to medical care), available at <http://www1.umn.edu/humanrts/africa/12thannex5.html> (last visited Feb. 2, 2002); see also *World Organisation Against Torture v. Zaire*, Communication Nos. 25/89, 47/90, 56/91, 100/93 (1996), reported in 4 HUM. RTS. REP. 89 (1997) (consolidating cases that, "taken together, showed evidence of serious or massive violations of human rights in Zaire" and holding the Zairean government's failure to ensure its citizens a minimum standard of health care constituted a violation of article 16 of the Charter), available at http://www.up.ac.za/chr/ahrd/comm_decisions.html#25/89 (last visited Feb. 2, 2002).

80. *Mutua*, *African Human Rights Court*, *supra* note 72, at 348.

81. Chidi Odinkalu, *The Individual Complaints Procedures of the African Commission on Human and Peoples' Rights: A Preliminary Assessment*, 8 TRANSNAT'L L. & CONTEMP. PROB. 359, 398 (1998). For a similar view, see Gino Naldi, *Reparations in the Practice of the African Commission on Human and Peoples' Rights*, 14 LEIDEN J. INT'L L. 681, 693 (2001).

82. *Id.* at 402.

83. Afr. Charter, *supra* note 2, art. 45(1).

Commission excels in its broad promotional mandate, it will face a deluge of ESCR cases. It remains to be seen if the newly created African Court on Human Rights⁸⁴ will be more successful in promoting and protecting ESCR. In the absence of effective promotion, individuals are less likely to assert their rights, no matter how clearly they are expressed.

C. Inept and Corrupt Leadership

It is a truism that the destiny of a people is tied to the quality of its leadership. Colonialism left Africa and Africans socio-economically battered. However, the ineptitude and corruption of certain past and present African leaders have worsened the socio-economic woes of the continent.⁸⁵ As George Kent argues, “[s]ome [African states] have had corrupt governments that exploited their own people as viciously as any outsiders have ever done.”⁸⁶ Corruption is hardly unique to Africa, but some African states have elevated it to an art form worthy of its own national museum. Resources that should have been utilized to provide basic facilities have been filched and transferred into the private Western bank accounts of high-ranking African leaders and officials.⁸⁷ Less directly, corrupt leaders steal by rejecting policies that would better spur development and promote ESCR in favor of policies that bring greater profits their way through businesses, investments, or unscrupulous cohorts. The interests of the people are pursued only to the extent that they coincide with the selfish interests of those in power. Corruption leads to

84. See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 9, 1998, OAU/LEG/EXP/AFCHPR/PROT (III) *not yet in force*, reprinted in 6 INT’L HUM. RTS. REP. 891 (1999). For an analysis of the Protocol and the history of the creation of the Court, see Nsongurua J. Udombana, *Toward the African Court on Human and Peoples’ Rights: Better Late Than Never*, 3 YALE HUM. RTS. & DEV. L.J. 45 (2000), available at <http://www.yale.edu/yhrdlj/>; Mutua, *African Human Rights Court*, *supra* note 72; Ibrahim Ali Baldwi El-Sheik, *Draft Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights: Introductory Note*, 9 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 943 (1997); Gino J. Naldi & Konstantinos Magliveras, *The Proposed African Court of Human and Peoples’ Rights: Evaluation and Comparison*, 8 REVUE AFRICAINE DE DROIT INTERNATIONAL ET COMPARÉ 944 (1996). Only three states (Burkina Faso, Gambia and Senegal) have ratified the Protocol; eight more are needed to bring the Protocol into force. For the status of ratification, see <http://www1.umn.edu/humanrts/instree/ratz2afchr.html> (last visited Feb. 2, 2002).

85. See Robert I. Rotberg, *Africa’s Mess, Mugabe’s Mayhem*, 79 FOREIGN AFF. 47 (2000).

86. Kent, *supra* note 58.

87. For instance, a former Nigerian military head of state, the late General Sani Abacha, is believed to have stashed away billions of dollars in foreign accounts. See Pres. Olusegun Obasanjo, *How We Fared in the Last One Year*, Broadcast Address on the One Year Anniversary of Civil Rule, May 29, 2000, VANGUARD (Lagos); Umozurike, *supra* note 29, at 48 (characterizing Abacha’s corruption as “a high-ranking cause of underdevelopment, resulting in malnutrition, lack of healthcare and other deprivations.”); see also Afe Babalola, *Legal and Judicial System and Corruption*, in AFRICA LEADERSHIP FORUM: CORRUPTION, DEMOCRACY AND HUMAN RIGHTS IN WEST AFRICA 93-94 (1994); Onyango, *supra* note 6, at 3 (noting how Mobutu’s “corruption and vice directly impinged upon the people of Zaire’s economic and social rights to adequate health care, sufficient food and appropriate shelter.”).

infringement of civil and political rights as well. Those emboldened enough to call for accountability and transparency in the conduct of public affairs are designated "security risks" or enemies of the "people" and become targets for incarceration or worse.⁸⁸

African corruption could not thrive on its own. Corrupt rulers receive significant outside support. As the Igbos of Nigeria say, when a person is dancing alone at the center of the road, his drummers must be somewhere nearby in the bush. The Cold War era stands out as a period of extensive outside support for repressive regimes and the propping up of corrupt rulers throughout Africa. The effects of this pernicious ideological wrangling can still be felt in Mozambique, Eritrea, Angola, and the Democratic Republic of Congo (formerly Zaire), among others. Adebayo Adedeji calls Somalia and Ethiopia "two . . . unfortunate examples of the havoc of the Cold War."⁸⁹

The Cold War also ensured the continued influx of external loans to many African rulers despite their known distinction in mismanagement. As the next section reveals, the servicing of these (sometimes spurious) debts continues to take a significant toll on the funding of public services such as health and education.⁹⁰

D. Debt and Structural Adjustment

Many African states, like other developing countries, are overburdened with heavy debts. Debt burdens are major obstacles to meaningful economic development in those states and contribute to non-enforcement of ESCR.⁹¹ According to the 1992 U.N.D.P. *Human Development Report*, from "1983-89, rich creditors received a staggering [\$]242 billion [dollars] in net transfers on long term lending from indebted developing countries."⁹² The greatest impact of this transfer, according to George Kent, "is in sub-Saharan Africa where the debt load is approximately equal to the region's cumulative gross national product."⁹³

88. See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT 1996, at 7, 34-36 (1995) (documenting accounts of suppression of freedom of expression of government critics in Nigeria); AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 1999, at 236-37 (1999) (describing the repression of freedom of expression in Liberia following criticisms of the government's handling of public affairs).

89. Adedeji, *supra* note 23, at 9-10. Adedeji argues that American support for Siad Barre's suppression of Somalians sowed the seed of the country's disintegration. The United States also scuttled several attempts to overthrow Mobutu Sese Sekou, who is believed to have amassed a fortune far in excess of his country's national debt. The Soviets' support allowed Mengistu Haile Mariam to decimate the Ethiopian people. *Id.*

90. See B.B.C. News Online, *Overdrawn: The Developing World's Debt Crisis*, April 28, 1999, at http://news.bbc.co.uk/1/hi/english/world/newsid_140000/140581.stm (last visited Feb. 2, 2002).

91. See Guissé, *supra* note 4, at para. 54.

92. U.N.D.P., HUMAN DEVELOPMENT REPORT 1992, at 45 (1992). The report also noted yearly debt-related net transfers of \$50 billion from developing to industrial countries up to 1992.

93. Kent, *supra* note 58. In some cases, the loans are "misappropriated by those

This situation has led to debt crises in these states, necessitating the current call for alleviation or renegotiation of their debts. Servicing these debts,⁹⁴ some of which are “merely a series of fictitious operations bringing no benefit to the populations concerned, which they are nevertheless called on to repay,”⁹⁵ greatly incapacitates the states involved. They also undermine the prospects of the affected states to provide even the most basic facilities needed to meet ESCR obligations. Debt servicing has had “especially negative impacts on the poor and their children, obliging them to do without food subsidies and health and other services, and often pressing them into exploitative working conditions.”⁹⁶ This devastating impact is not mitigated by international development assistance, because, as George Kent notes,

[t]he amount of money going from the [S]outh to the [N]orth for debt servicing greatly exceeds the current amounts of official development assistance going from the [N]orth to the [S]outh. Moreover, official development aid is likely to benefit the rich and the middle class rather than the poor . . . [since it] does not concentrate on the most needy either within countries or among countries.⁹⁷

Under the dual burden of debt and evaporating aid, many African states were goaded into adopting the structural adjustment policies⁹⁸ of the International Monetary Fund (I.M.F.) and World Bank. These policies appear to have worsened their economic circumstances.⁹⁹ These states

responsible for managing them, to be redeposited in the banks of the creditor countries or reinvested in companies in those same countries.” Guissé, *supra* note 4, at para 57.

94. Nigeria currently spends \$3.5 billion (more than 40 percent of its 2000 budget) annually to service its debt burden of about \$33 billion. See Laolu Akande, *Ahead Visit, Clinton Begins Debt-Pardon Crusade for Nigeria*, THE GUARDIAN (Lagos), July 13, 2000.

95. Guissé, *supra* note 4, at para 57.

96. Kent, *supra* note 58.

97. *Id.*; see also Yemi Osinbajo & Olukonyisola Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT’L LAW. 727, 731 (1994). Strikingly, it has been reported that the “I.M.F. took £390m more out of Africa than it put in, in 1997” and that for every £1 given in aid by the West, £3 goes back to it as debt repayment. B.B.C. NEWS ONLINE, *supra* note 90.

98. Structural adjustment has been defined as “reforms of policies and institutions covering micro-economic (such as taxes and tariffs), macro-economic (fiscal policy) and institutional interventions—these are changes designed to improve resource allocation, increase economic efficiency, expand growth potential and increase resilience to shocks.” WORLD BANK, STRUCTURAL ADJUSTMENT AND POVERTY: A CONCEPTUAL, EMPIRICAL AND POLICY FRAMEWORK 22 (1990), cited in SKOGLY, *supra* note 41, at 755. According to Skogly, “[t]he premise of structural adjustment conditions is that certain economic factors should be altered in a given country to ensure better economic performance with a view to repay debt and debt servicing, to achieve a better balance of payment situation, and to achieve a healthier economy in general.” *Id.* at 756. See also Caroline Thomas, *International Financial Institutions and Social and Economic Human Rights: An Exploration*, in HUMAN RIGHTS FIFTY YEARS ON, *supra* note 3, at 167 (noting that “[t]here was an unspoken agreement that adjustment and debt repayment would be rewarded by inflows of new finance and investment.”).

99. See Osinbajo & Ajayi, *supra* note 97, at 731.

have had to reduce their imports, devalue their currencies, deregulate capital movements, privatize state public utilities, dismantle social programs by cutting government expenditures on social services, such as health care, education and removal of subsidies on market staples, and provide "national treatment" to foreign investors.¹⁰⁰ "These provisions," according to Michel Chossudovsky, "are often coupled with a 'bankruptcy programme' under the supervision of the World Bank with a view to triggering the liquidation of competing national enterprises,"¹⁰¹ with the obvious "loss of indigenous control of critical areas of the economy." The adjustments culminate in severely austere measures that unleash sweeping pauperization on the majority of people and "a severe deterioration in the abilities of these countries to uphold the economic and social rights of their peoples."¹⁰²

The obvious impact of structural adjustment programs is to reduce the capacity of the states to meet their human rights obligations.¹⁰³ In Africa and elsewhere, structural adjustment programs adversely affect not only ESCR, but also civil and political rights.¹⁰⁴ As Yemi Osinbajo and

100. See Kent, *supra* note 58 ; see also Michel Chossudovsky, *World Trade Organisation (WTO): An Illegal Organisation that Violates the Universal Declaration of Human Rights*, HUM. RTS. ARTICLES (Derechos Human Rights, N.G.O.), at <http://www.derechos.org/nizkor/doc/articulos/chossudovsky.html> (last visited Feb. 2, 2002).

101. Chossudovsky, *supra* note 100.

102. Osinbajo & Ajayi, *supra* note 97, at 731. Zimbabwe used to provide free education for all until adherence to an I.M.F. structural adjustment program brought it to an end. See Maria Nzomo, *The Political Economy of the African Crisis: Gender Impacts and Responses* 51 INT'L J. 78 (1996); Bharati Sadasivam, *The Impact of Structural Adjustment on Women: A Governance and Human Rights Agenda*, 19 HUM. RTS. Q. 630, 641 (1996); see also, J. Oloka-Onyango, *Poverty, Human Rights and the Quest for Sustainable Human Development in Structurally-Adjusted Uganda*, 18 NETH. Q. HUM. RTS. 23, 24 (2000). Onyango elsewhere explains:

In more specific ways, structural adjustment affects working conditions and the right to work through retrenchment as a result of deindigenization, privatisation and the liberalization of trade controls. The extent of available health care and its costs is severely affected by the introduction (as in Zimbabwe) of user fees, which is an additional burden on people who are already impoverished and exist largely in a subsistence economy. The nature of educational services and their accessibility is affected by the increase in fees for tuition Finally, the ability to provide food and combat poverty is affected by the overall concentration on export crops and removal of subsidies for market staples.

Onyango, *supra* note 6, at 27.

103. See Lawrence Tshuma, *The Impact of I.M.F./World Bank Dictated Economic Structural Adjustment Programmes on Human Rights: Erosion of Empowerment Rights*, in *THE INSTITUTIONALISATION OF HUMAN RIGHTS IN SOUTHERN AFRICA* 219, 227 (Pearson Nherere & Marina d'Engelbronner-Kolff eds., 1993); see also Sigrun I. Skogly, *Human Rights and Economic Efficiency: The Relationship Between Social Cost of Adjustment and Human Rights Protection*, in *HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1994*, at 43-65 (Peter Baehr et al. eds., 1994).

104. See Tshuma, *supra* note 103, at 230; see also Margaret Conklin & Daphne Davidson, *The I.M.F. and Economic and Social Human Rights: A Case Study of Argentina, 1958-1985*, 8 HUM. RTS. Q. 227 (1986) (exploring the violations of all human rights following the adoption of structural adjustment policies in Argentina).

Olukonyisola Ajayi observe, “[f]aced with standards of living well below poverty levels, the citizenry has usually responded with strikes, rioting, and other forms of dissent, which have almost always been met with suppression by force or draconian legislation”¹⁰⁵ Although the structural adjustment policies are sold to states as the only way to improve their economies and reduce their debt burdens¹⁰⁶, the adjustment policies have merely worsened the social and economic ruin in these countries.¹⁰⁷ This led the U.N. Sub-Commission on Human Rights Special Rapporteur to conclude that the adjustment policies “are actually means designed to recover the sums owed to the wealthy countries without any concern for the debtor countries.”¹⁰⁸ The debts have increased exponentially instead of decreasing,¹⁰⁹ making the attempt at debt control and recovery an undisguised “failure as blatant as it is significant.”¹¹⁰

Structural adjustment promotes marginalization and deprivation of ESCR by both worsening conditions and preventing states from recognizing or enforcing ESCR. By its example, the imposition of these policies devalues an ethos of accountability. External actors, who are not accountable to the affected people, induce these measures.¹¹¹ Despite these policies’ track record of dehumanizing affected populations, many African

105. Osinbajo & Ajayi, *supra* note 97. In Ghana, Senegal, Nigeria, and Zambia, the ruling regimes resorted to repression to implement adjustment programs. See Tshuma, *supra* note 103, at 229. For the I.M.F.’s and World Bank’s need for policies on accountability and human rights, see Daniel D. Bradlow, *The World Bank, the I.M.F., and Human Rights*, 6 TRANSNAT’L L. & CONTEMP. PROBLEMS 47 (1996). It has been argued that women suffer most both from the economic crisis and from the adjustment policies. See Christine Chinkin & Shelly Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 MICH. J. INT’L L. 262, 313 (1993); see also Sadasivam, *supra* note 102.

106. See, e.g., Gerald Scott, *Who Has Failed Africa?: I.M.F. Measures or the African Leadership?* 33 J. ASIAN & AFR. STUD. 265, 268-70 (1998) (arguing that I.M.F. programs are the most effective available option for addressing Africa’s economic woes). But see S. P. Schatz, *The World Bank’s Fundamental Misconception in Africa*, 34 J. MOD. AFR. STUD. 239 (1996) (demonstrating that, contrary to I.M.F./World Bank claims, the implementation of structural adjustment most often causes poorer economic performance); S.P. Schatz, *Structural Adjustment in Africa: A Failing Grade So Far*, 32 J. MOD. AFR. STUD. 679 (1994) (same).

107. See Paul J. Kaiser, *Structural Adjustment and the Fragile Nation: The Demise of Social Unity in Tanzania*, 34 J. MOD. AFR. STUD. 227, 231-37 (1996) (linking the decay of social cohesion in Tanzania to the introduction of structural adjustment).

108. Guissé, *supra* note 4, at para. 66.

109. See Peter Baehr et al., HUMAN RIGHTS IN DEVELOPING COUNTRIES: YEARBOOK 1996, at 394 (Peter Baehr et al. eds., 1996) (noting the exponential increase in the debt of Uganda since its adoption of structural adjustment policies).

110. Guissé, *supra* note 4, at para. 63. For a more detailed exploration of the impact and failures of structural adjustment policies in Africa, see THE IMPACT OF STRUCTURAL ADJUSTMENTS ON THE POPULATION OF AFRICA (Aderanti Adepoju ed., 1993); CRISIS AND ADJUSTMENT IN THE NIGERIAN ECONOMY (Adebayo Olukoshi ed., 1991); AUTHORITARIANISM, DEMOCRACY AND ADJUSTMENT: THE POLITICS OF ECONOMIC REFORM IN AFRICA (Peter Gibbon et al. eds., 1992); THE POLITICS OF STRUCTURAL ADJUSTMENT IN NIGERIA (Adebayo Olukoshi ed., 1993).

111. See Obiora Chinedu Okafor, *Re-Conceiving “Third World” Legitimate Governance Struggles in Our Time: Emergent Imperatives for Rights Activism*, 6 BUFF. HUM. RTS. L. REV. 1, 1-37 (2000) (demonstrating how international financial institutions have assumed an ever-increasing share of Third World governance); see also Anne Orford, *Locating the International: Military and Monetary Interventions After the Cold War*, 38 HARV. INT’L L.J. 443, 451-60 (1997).

states are still being goaded into accepting them as a condition for rescheduling or cancellation of their debts.¹¹² One is tempted to agree with the suggestion that “perpetuating the debt of the developing countries is the result of a deliberate and political decision designed solely to frustrate any attempt by the developing countries and their peoples to achieve economic and social progress.”¹¹³ The fact that “countries that oppose the measures suggested by the institutions (themselves agents of neo-colonial interests) do not receive any financial assistance”¹¹⁴ amply lends credence to the suggestion. Just as debts and structural adjustments are vital instruments sustaining the continued deprivation of ESCR of the people, there are growing fears that globalization further exacerbate human suffering and erosion of socio-economic rights.¹¹⁵ Be that as it may, African states’ relative achievement in the enforcement of civil and political rights shows that where the international will does exist greater achievements will be made in the enforcement of ESCR.

E. International Apathy and Hostility

One of the greatest impediments to the enforcement and realization of ESCR in Africa is the indifference—and even hostility—of the international community towards enforceable ESCR. The most notable monument to this attitude is the fact that the UDHR had to be translated into two covenants instead of one.¹¹⁶ Although lip service was paid to the notion of ESCR during much of the Cold War, indifference and apathy towards enforceable ESCR grew increasingly in the later years of the Cold War and especially since the end of the Cold War.¹¹⁷ The end of the Cold War deprived ESCR of the support of a superpower, the Soviet Union, on the international stage. The demise of the Soviet Union was taken as the defeat of an ideology that emphasizes ESCR and a victory for liberal ideology that

112. In 2000, U.S. Treasury Secretary Larry Summers announced that the United States would support Nigeria’s bid for debt rescheduling only if Nigeria accepts the structural adjustment policies of the I.M.F. and “manages to keep up with the terms of [the] program with the International Monetary Fund.” Stephen Fidler, *Nigeria Wins U.S. Debt Backing*, FINANCIAL TIMES, June 12, 2000; see also Arthur Obayuwana, *U.S. Links Support for Debt Relief to I.M.F. Conditions*, THE GUARDIAN (Lagos), June 13, 2000.

113. Guissé, *supra* note 4, at para. 59.

114. Skogly, *supra* note 41, at 756.

115. There is ample scholarship addressing the negative impact of globalization on ESCR in both developed and developing states. See generally MICHEL CHOSSUDOVSKY, *THE GLOBALIZATION OF POVERTY: IMPACTS OF THE IMF AND WORLD BANK REFORMS* (1997); *GLOBALIZATION: CRITICAL REFLECTIONS* (J. Mittleman ed., 1996); Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735 (1999).

116. See HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, AND MORALS* 256-57 (2d ed. 1996).

117. But see Mugwanya, *supra* note 72, at 38 (celebrating the end of the Cold War as having “liberated international efforts to promote human rights from ideological conflicts and political sloganeering”). On the contrary, the end of the Cold War merely shifted ideological battlefronts, making the war more covert and dangerous. The “victory” enthroned a mentality of ideological victors and vanquished, making the “victors” more entrenched in their ways to the detriment of ESCR enforcement.

emphasizes civil and political rights to the exclusion of ESCR.

The supposed victory of liberalism led to the current "development orthodoxy"¹¹⁸ based on economic and political liberalism, which is being sold as the best method for maximizing global welfare.¹¹⁹ Yet, as Caroline Thomas points out, "evidence of such a claim is lacking, resting largely on the perceived absence of alternatives. [*Per contra*,] evidence against seems to be mounting."¹²⁰ Furthermore, "even the supporters of the neoliberal market economics have had to admit its abysmal failure to assist the world's poor"¹²¹ and improve the realization of ESCR.¹²² Despite all the praises for the market system of wealth creation as the most effective that humanity has yet devised, "it remains an imperfect force since two-thirds of the world's population have gained little or no substantive advantage from rapid economic growth. [Even] in the developed world, the lowest quartile has witnessed trickle-up rather than trickle-down."¹²³ Although international markets may give little reason for hope, one cannot underestimate the potency of external pressures on the overall improvement of the human rights situation in Africa.¹²⁴ What these influences have helped to achieve with respect to civil and political rights—including entrenching those rights as enforceable under the various constitutions—has not, however, been attempted with regard to ESCR. Even prominent transnational human rights organizations have yet to rise fully to the occasion in the area of ESCR.¹²⁵ Thus, while perceived

118. Thomas, *supra* note 98, at 164.

119. *Id.*

120. *Id.*; see also B. Crossette, *U.N. Survey Finds World Rich-Poor Gap Widening*, N.Y. TIMES, July 15, 1996, at A3 (highlighting the global inequality which continues to characterize the global social order).

121. Thomas, *supra* note 98, at 165.

122. See G. Lean & Y. Cooper, *The Theory Was That as the Rich Got Richer We'd All Benefit. But It Hasn't Worked*, INDEPENDENT ON SUNDAY, July 21, 1996, at 52-53.

123. Thomas, *supra* note 98, at 165 (notes and citations omitted). See also Donnelly, *supra* note 16, at 630 (describing free markets as "an economic analog to a political system of majority rule without minority rights").

124. Such external pressures include linking financial assistance to the human rights records and performance of prospective recipient states. See Agbakwa, *supra* note 47, at 22-24; Olusola Ojo & Amadu Sesay, *The O.A.U. and Human Rights: Prospects for the 1980s and Beyond*, 8 HUM. RTS. Q. 89, 92 (1986); UMOZURIKE, *supra* note 29, at 27; Amy Young-Anawety, *Human Rights and ACP-EEC Lome II Convention*, 13 N.Y.U. J. INT'L L. & POL. 63, 71-74 (1980).

125. See, e.g., HUMAN RIGHTS WATCH, ECONOMIC, SOCIAL AND CULTURAL RIGHTS ("Since its formation in 1978, Human Rights Watch has focused mainly on upholding civil and political rights, but in recent years we have increasingly addressed economic, social and cultural rights as well. . . . We pay special attention to economic, social and cultural rights violations when they result from violations of civil and political rights or must be remedied as part of a plan for ending violations of civil and political rights."), at <http://www.hrw.org/esc/> (last visited Feb. 2, 2002); AMNESTY INTERNATIONAL, ABOUT A.I. ("Amnesty International is a worldwide campaigning movement that works to promote all the human rights enshrined in the Universal Declaration of Human Rights and other international standards. In particular, Amnesty International campaigns to free all prisoners of conscience; ensure fair and prompt trials for political prisoners; abolish the death penalty, torture and other cruel treatment of prisoners; end political killings and "disappearances"; and oppose human rights abuses by opposition groups."), at <http://web.amnesty.org/web/aboutai.nsf> (last visited Feb. 2, 2002). African and African-

violations of civil and political rights give rise to a hue and cry, there is usually only silence in the face of egregious violations of ESCR, thereby creating the impression that no injustice has been done and emboldening violators. With insufficient or no pressure on them, several governments continue to deny the enforcement and justiciability of socio-economic rights and to misuse funds.¹²⁶

Arguably, the efforts of some African states with respect to the enforcement of civil and political rights would not have materialized without the pressures of the international community—states, NGOs, and civil society. It follows that similar efforts by the international community with respect to ESCR might have achieved similar results in the enforcement of ESCR.¹²⁷ However, most states either lack the moral high ground to criticize other states about their respect for ESCR or will not do so for ideological reasons. As a consequence, ESCR remain the province of impunity. Moreover, developed states have successfully marketed at home and abroad a mythology that ESCR are prohibitively expensive, convincing less developed states that the path to economic wealth cannot include enforceable ESCR.¹²⁸

The hostility of some Western states to the notion of enforceable ESCR¹²⁹ reveals itself in their various tactics to undermine the efforts of developing states moving in the direction of implementation or enforcement of ESCR. This undermining takes place directly or by proxy, through agents, multinational corporations, the World Trade Organization (W.T.O.) or other international financial institutions.¹³⁰ For instance, in the

based N.G.O.s have been, for the most part, as unconcerned in this regard as international human rights organizations. This is unfortunate, for human rights are not given, they are taken through struggle against the political elite. See Harry M. Scoble, *Human Rights Non-Governmental Organisations in Black Africa: Their Problems and Prospects in the Wake of the Banjul Charter*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 177 (Claude E. Welch & Ronald I. Meltzer eds., 1984).

126. See Ojo & Sesay, *supra* note 124, at 103 (noting the negative impact of the absence of “potent pressure on African leaders in the way they treat their citizens”). See generally Augustine Ikelegbe, *Civil Society, Oil and Conflict in the Niger Delta Region of Nigeria: Ramifications of Civil Society for a Regional Resource Struggle*, 39 J. MOD. AFR. STUD. 437 (2001) (noting the impact of civil groups’ sustained engagement with, and pressures on, both state and non-state actors in elevating or compelling the entrance of a human rights problem onto the national agenda, warranting more urgent resolutions than would have been the case).

127. In spite of all pretensions, human rights and law—especially international law—remain what a community or its powerful members say they are. See John O’Manique, *Development, Human Rights and Law*, HUM. RTS. Q. 383, 405-06 (1992); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 PROC. AM. SOC’Y INT’L L. 101-20 (1981).

128. See Thomas, *supra* note 98, at 171-72.

129. According to Philip Alston, the U.S. presidential administrations of Ronald Reagan and George H. Bush rejected entirely the notion of ESCR. Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365 (1990).

130. Other tactics include: the perpetuation of indebtedness and initiation of catastrophic economic policies, see Guissé, *supra* note 4, at para. 60; Rhoda E. Howard, *Civil Conflict in Sub-Saharan Africa: Internally Generated Causes*, 51 INT’L J. 26, 32 (1996); Orford, *supra* note 111, at 464-75; pressuring the various countries to open up their borders to permit the dumping of products that end up stifling local industries, see Kent, *supra* note 58; toppling regimes that are opposed to these tactics, see Ariande K. Sacharoff, *Multinationals in Host Countries: Can They Be*

past few years, some Western states, particularly the United States, have undermined the efforts of certain developing countries to obtain cheaper generic drugs by threatening trade sanctions, notwithstanding that “drug costs account for up to 60 percent of health care budgets in poor countries.”¹³¹ In a crass show of insensitivity, the U.S. fought South Africa’s policies to procure cheaper generic HIV drugs, in spite of clear evidence of a catastrophic AIDS epidemic in South Africa. According to Bess-Carolina Dolmo, even when U.S. pressure on South Africa was eased due mainly to pressures from civil society groups, the U.S. still directed its “arsenal trade attacks” on “other nations that have enacted [similar] measures permitting compulsory licensing and parallel trade”¹³²

The foregoing example is emblematic of developed states’ attitudes towards developing states’ socio-economic development. In his final report on the impunity of perpetrators of ESCR violations, U.N. Commission on Human Rights Special Rapporteur, Mr. El Hadji Guissé notes:

During the discussions on the methods of implementing economic, social and cultural rights, . . . the representatives of several developing countries expressed the fear that the inevitably slow progress in realizing those rights might be taken for unwillingness on their part. *They had not reckoned with the developed countries’ determination to undermine any possible basis for a truly fair world economic order where economic, social and cultural rights would have a fair chance of being realized.* It was soon observed afterwards that the fears of the former and the hypocrisy of the latter very rapidly became a source of massive grave violations of economic, social and cultural rights”¹³³

Held Accountable for Human Rights Violations?, 23 BROOK. J. INT’L L. 928-64 (1998) (describing the toppling of regimes that insisted on improving the lots of the people); and exporting harmful and hazardous wastes that imperil the health of the recipient states while at the same time goading them to cut back on health care, see James H. Colopy, *Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States*, 13 UCLA J. ENVTL. L. & POL’Y 167, 171-81 (1995). A World Bank Chief Economist (and former U.S. Treasury Secretary under Clinton) wrote in an internal memo:

I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that. . . . I’ve always thought that under-populated countries in Africa are vastly under-polluted; their air quality is probably vastly inefficiently [high] compared to Los Angeles or Mexico City.

Let Them Eat Pollution, ECONOMIST (London), Feb. 8, 1992, at 66; see also *Pollution and the Poor*, ECONOMIST (London), Feb. 15, 1992, at 18.

131. Bess-Carolina Dolmo, *Examining Global Access to Essential Pharmaceuticals in the Face of Patent Protection Rights: The South African Example*, 7 BUFF. HUM. RTS. L. REV. 137, 151 (2001); see also *Blood and Gore: Office of the U.S. Trade Representative Goes Too Far in Promoting Interests of U.S. Drug Companies Abroad*, THE NATION, July 19, 1999, at 16, available at <http://past.thenation.com/1999/990719.shtml> (last visited Feb. 2, 2002).

132. Dolmo, *supra* note 131, at 151.

133. Guissé, *supra* note 4, at para. 16 (emphasis added); see also *Why King Gold Has No*

The inescapable conclusion is that, not only did the international community fail to provide the active support it might have, but also members of the international community actively hindered the development of ESCR. Without such hostile interference, ESCR might have fared better in many African states than they have.

IV. CONSEQUENCES OF CONTINUED MARGINALIZATION

Certain implications are conspicuously discernible from the continued marginalization of the enforcement of ESCR. As Henry Shue observes, "to enjoy something only at the discretion of someone else, especially someone powerful enough to deprive you of it at will, is precisely *not* to enjoy a *right* to it."¹³⁴ The notion of a non-enforceable right is nothing but a negation of the very concept of right.¹³⁵ Continued marginalization of the enforcement of ESCR dresses these rights in the garb of mere luxuries. This deception is emblematic and symptomatic of the continued oppression, and relegation to second-class citizens, of those most dependent on such rights for basic survival.¹³⁶

For a region that has staked its integrity on the adoption of a document that gives equal prominence to all aspects of human rights, maintaining a contradictory posture at the domestic level is an exercise in self ridicule. It also casts the Charter in a bad light for proclaiming what cannot be guaranteed. By marginalizing the enforcement of these rights, the African claim that the satisfaction of ESCR is the precondition for the enjoyment of civil and political rights in international fora rings hollow and remains exposed for what it is: a poor excuse for insensate violations.

The continued marginalization of ESCR also deepens the collective feeling of betrayal of the African people. The modern state's displacement of traditional African systems, which, to a great extent, ensured the welfare of every member of the community, failed to bring with it an adequate replacement.¹³⁷ Unlike traditional structures, the state appears as a remote center of power that has no relevance to the lives of the people. This feeling of betrayal manifests itself in various forms, including lack of faith in the process of supposed democratic governance.

Accordingly, one of the most serious consequences of the continued marginalization of ESCR is the prolongation of the existing crisis of state and governmental legitimacy in Africa. People hold minimum

Clothes, 402 NEW AFR., Dec. 2001, at 29-37 (describing other instances of undermining the basis for a fair economic order).

134. Henry Shue, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND U.S. FOREIGN POLICY 78 (1980).

135. According to Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 37 (1999), "[a] state that fails to protect fully individuals against human rights violations or that otherwise violates remedial rights commits an independent, further violation of internationally -recognized human rights."

136. See Skogly, *supra*, note 41, at 770 (discussing the advantages of effective recognition of all human rights, especially economic, social and cultural rights).

137. See Agbakwa, *supra* note 47, at 100-09.

expectations of their state and government. These expectations are “the irreducible duties of any ruling apparatus to its subjects, such that a failure to discharge these duties vitiates the legitimacy of the regime’s assertion of authority.”¹³⁸ When such expectations are not met, it fuels the general level of disaffection and dissatisfaction that may lead to the fall of the government, either by constitutional or extra-constitutional means. As Jack Donnelly argues:

The link between a regime’s ability to foster development (prosperity) and the public’s perception of the regime’s legitimacy is close to a universal, cross-cultural political law. Whatever a ruling regime’s sociological and ideological bases, its *sustained or severe inability to deliver prosperity*, however that may be understood locally, *typically leads to a serious political challenge*.¹³⁹

Donnelly’s argument is particularly apt for Africa. As has been argued earlier, the continued deprivation of ESCR sometimes leads to popular insurrections and civil war.¹⁴⁰ In such situations, existing governments are perceived as having outlived their usefulness as a result of the deterioration of the basic socio-economic rights of the people.¹⁴¹ As in Somalia, crisis generated by an attempt to oust an incumbent government threatens the foundations of the state and may lead to its disintegration.

In the ensuing crisis of legitimacy, maintaining law and order can be difficult or impossible, and civil and political rights are likely to be neglected. Economic activities are also truncated, thus imperiling developmental efforts. This bad situation is made worse when people are

138. Brad R. Roth, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 21 (1999). For a critique of Roth, see James Thuo Gathii, *Governmental Illegitimacy in International Law*, 98 MICH. L. REV. 1996 (2000) (book review).

139. Donnelly, *supra* note 16, at 609 (emphasis added).

140. See *supra* notes 19, 20, 23-26. In its 1979-80 annual report, the Inter-American Commission on Human Rights noted the existence of an “organic relationship between the violation of rights to physical security on the one hand, and neglect of economic and social rights . . . on the other.” It further noted that “neglect of economic and social rights, especially when political participation has been suppressed, produces the kind of social polarization that leads to acts of terrorism by and against the government.” INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1979-80, at 151 (1980). The Commission reiterated in 1991 that “it is evident that in many cases poverty is a wellspring of political and social conflict.” ANNUAL REPORT 1991, at 305 (1991); see also Orford, *supra* note 111, at 451-55 (noting the role of economic crisis in the loss of legitimacy of the Yugoslavian federal government, which snowballed into fratricidal civil conflict). But see Milner et al., *supra* note 28, at 412 (arguing that “people at the lowest level of needs fulfilment would have neither the wherewithal nor the energy to pose threats to a regime, no matter how displeased they were with the status quo”).

141. The civil wars in Liberia, Sierra Leone, and to an extent Angola, owe their origin and continuation to the deterioration of the basic socio-economic rights of the people. See Anthony Barclay, *Consolidating Peace Through Governance and Regional Cooperation: The Liberian Experience*, in AFRICAN CONFLICTS, *supra* note 23, at 303-05; John B. Leggah et al., *Sierra Leone*, in AFRICAN CONFLICTS, *supra* note 23, at 181; Reginald Green, *Angola: Seeking to Remedy the Limitations and Bias in Media and Scholarly Coverage*, in AFRICAN CONFLICTS, *supra* note 23, at 203.

displaced as refugees.

Even in the absence of a full-blown civil conflagration, want and deprivation create an atmosphere that is not conducive to the enjoyment of civil and political rights. As Donnelly states, "those living on the economic edge or with no realistic prospect of a better life for their children are much less likely to be willing to accommodate the interests and rights of others."¹⁴² Thus, in the absence of measures that are likely to ensure the realization of all rights, protecting only civil and political rights without ESCR is tantamount to making ropes out of sand.

Protecting all rights requires both the implementation of existing approaches, like effective judicial review, and the development of alternative approaches, as discussed in the next section.

V. STRATEGIZING THE WAY FORWARD

A. Rejection of the Western Model

Unless there is a committed rejection of the dominant Western paradigm that has historically viewed civil and political rights as the rights that are most worthy of enforcement, substantial progress towards the enforcement of ESCR in Africa may continue to elude African states. The West may be able to maintain such a model, because its attainment of an appreciable standard of living provides an environment that enables the enjoyment of civil and political rights. African states do not enjoy this luxury. They cannot afford this model without facing widespread civil and social strife. Already, by adopting a charter that departs markedly from the European Convention and Inter-American Convention, African states demonstrated an understanding of the inadequacies of the two systems for their purposes. A rejection of the Western model, therefore, merely requires a practical commitment to the noble intentions expressed in the African Charter.

This practical commitment does not necessarily entail guaranteeing the maximum enjoyment of all the Charter's provisions on ESCR. Rather, it requires judicial (including quasi-judicial and other forms of independent review), legislative, and executive actions to ensure a baseline, minimum protection of all rights equally. A truly African approach is one that *practically* parallels the African Charter or one that *critically* reflects the South African model.

Rejection of the Western model, as advocated here, presupposes a complete rejection of ideologies that subordinate ESCR. It does not, however, advocate a puritanical isolationist movement that heedlessly rejects the obvious achievements of the institutional structures of Western human rights regimes. As the next section demonstrates, the institutional

142. Donnelly, *supra* note 16, at 610.

mechanisms of these older regimes have something important to offer in spite of their normative and ideological shackles.

B. Alternative Enforcement Approach

The best way to effectuate any human rights provision may be to subject it to direct judicial scrutiny in the way that many systems currently protect certain human rights.¹⁴³ For ESCR, such procedures are lacking in many African states. Given the necessity of ensuring effective protection of human dignity—the enjoyment and protection of all rights without discrimination—additional means ought to be utilized to give effect to ESCR provisions.

In recommending the adoption of the following approaches, I am wary of appearing to advocate subjugation of ESCR to other rights. I do not. Rather, these approaches are put forward as interim measures pending the adoption by state authorities of a regime of directly enforceable (justiciable) ESCR. Ironically perhaps, I draw insights from the jurisprudence of Western human rights systems (European and Inter-American) that place ESCR in a subservient position and whose ideological foundations I partially reject. However, if, as I have argued, it is true that ESCR and other rights are inseparable, it should not be surprising that effective systems set up to protect the latter will find their way into the territory of the former. These regimes have recently demonstrated an ability to adjust to the challenges of addressing basic violations of ESCR.¹⁴⁴ In particular, the European Court on Human Rights offers a rich insight into how a progressive judicial, quasi-judicial, or administrative body can transcend normative hurdles in finding solutions to serious human rights problems. Its jurisprudence is, therefore, relevant for immediately effectuating ESCR in African states where these rights are still not domestically justiciable, notwithstanding the provisions of the African Charter.

1. Concerted and Integrated Approach

The fact that ESCR are regarded as mere aspirations and are non-justiciable in several African constitutions,¹⁴⁵ as well as largely ignored at the regional level, means that there is as yet no hope for their direct judicial

143. While judicial remedies constitute the principal guarantees of human rights, they do not always present the most desirable means by which to affirm these rights. Sometimes, given their costly, time-consuming, and procedure-laden nature, individuals may prefer to pursue administrative avenues to settle their disputes. Indeed, there is growing evidence that individuals are turning to non-judicial remedies. See Wieruszewski, *supra* note 35, at 279 n.13. In light of this fact, the approaches discussed below are equally amenable to judicial, quasi-judicial, and administrative measures.

144. For insight into how the ECHR is adapting to the challenges of basic violations of ESCR, see, for example, Aisling Reidy et al., *Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey*, 15 NETH. Q. HUM. RTS. 161 (1997).

145. Above, I have listed examples of such constitutions. See *supra* note 46.

enforcement as independent rights. Accordingly, a concerted and integrated approach that takes advantage of currently enforced rights is needed.

The concerted and integrated approach seeks to enforce ESCR through the provisions on civil and political rights that are, or usually are, justiciable.¹⁴⁶ Using this method, ESCR can get their foot in the door, where they can be developed, expanded, and enforced by the domestic courts, the African Court of Human Rights (when it becomes operational), the African Commission, and national human rights commissions (where they exist).¹⁴⁷ It is not certain that these African institutions will rise to the occasion, but there is a strong chance of it. These institutions will merely be holding the states to the standards they recognized by ratifying the Charter and to which the states assumed a definite and binding obligation to give effect in their respective domestic legal order.¹⁴⁸ It is clear that some African judges would make the most of an opportunity to put ESCR and other rights on equal footing. As a retired Justice of the Nigerian Supreme Court recognized:

The fundamental rights provisions of our Constitution (dealing with civil and political rights) cannot be appreciated let alone enjoyed in a state of utter illiteracy and abject poverty. To attain true liberty and freedom the average [citizen] needs to have equal access to . . . decent housing and health services. If these opportunities are not equal and, or, equally accessible, then the talk of liberty, of equality or even justice will be a far cry . . .¹⁴⁹

The concerted and integrated approach accords with the functional or interpretative approach practiced by the European Court of Human Rights. Under the European system of human rights, State Parties' obligations with respect to socio-economic rights are, in the words of Matti Pellonpää, "of a somewhat less straightforward nature, and the international supervision

146. See Bard-Anders Andreassen, *Article 22, in THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 453, 487 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

147. Human rights commissions currently exist in a number of African states, including Benin, Cameroon, Chad, Ghana, Kenya, Liberia, Malawi, Nigeria, Rwanda, Senegal, South Africa, Sudan, Togo, Uganda and Zambia. Plans are underway to establish such commissions in Ethiopia and Tanzania. Many of the commissions, however, have remained administrative outposts for the government of the day and have proven to be disappointments. Many have very limited and flawed mandates with limited ability to investigate, monitor, or make public statements. But some—like the Ghanaian, Senegalese, South African, Nigerian and Ugandan commissions—appear very promising in their activities so far. See HUMAN RIGHTS WATCH, *HUMAN RIGHTS WATCH WORLD REPORT 1999*, at 12-13 (1998). For a detailed assessment of the performance of some of these commissions, see Obiora Chinedu Okafor & Shedrack C. Agbakwa, *On Legalism, Popular Agency and "Voices of Suffering": The Nigerian National Human Rights Commission in Context*, 24 HUM. RTS. Q. (forthcoming Aug. 2002).

148. See U.N. Committee on ESCR, *General Comment No. 9*, U.N. Doc.E/C.12/1998/24, reprinted in 6 INT'L HUM. RTS. REP. 289 (1999).

149. C. A. Oputa, *Commentary*, in ALL NIGERIAN JUDGES CONFERENCE PAPERS 1982, at 290 (A. G. O. Agbaje ed., 1983).

far less effective”¹⁵⁰ having been left to the less judicial mechanisms of the European Social Charter.¹⁵¹ In the absence of judicial enforcement for rights provided under the Social Charter, the European Court has assumed a dynamic mode of interpretation that seeks to effectuate the socio-economic rights provided in the Social Charter. In *Airey v. Ireland*, the European Court of Human Rights found connection between the classical civil liberties covered by the European Convention and socio-economic rights covered by the Social Charter.¹⁵² The Court noted:

Whilst the [European Convention on Human Rights] sets forth what are essentially civil and political rights, *many of them have implications of a social or economic nature*. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; *there is no water-tight division separating that sphere from the field of the Convention*.¹⁵³

In *Airey*, the Court held that a person seeking legal separation from a spouse had a right to legal aid if she could not afford to pay a lawyer. The Court found that denying Ms. Airey such aid amounted to a violation of her right of access to courts and of her right to a fair trial guaranteed by Article 6 of the European Convention. The Court rejected the Government’s argument that “the [European] Convention should not be interpreted so as to achieve social and economic developments in a Contracting State.”¹⁵⁴ The case shows how political rights can be used to secure economic rights, and indeed, how they are inextricably linked.

In *Schuler-Zgraggen v. Switzerland*,¹⁵⁵ the Court extended protections against discrimination under Article 6(1) and Article 14 of the European Convention to ESCR. The Court held, “today the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance.”¹⁵⁶ In *Akdivar v. Turkey*,¹⁵⁷ the Court recognized claims that forced evictions violated the right to privacy under Article 8 of the European Convention. Similarly, in *Feldbrugge v. The Netherlands*¹⁵⁸ and

150. Matti Pellonpää, *Economic, Social and Cultural Rights*, in THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS 855, 857 (R. St. Macdonald et al. eds., 1993).

151. European Social Charter, *entered into force* Feb. 26, 1965, Europ. T.S. No. 35, 529 U.N.T.S. 89.

152. *Airey v. Ireland*, 2 Eur. Ct. H.R. 61 (1979), 2 EUR. H.R. REP. 305 (1979).

153. *Id.* at 316-17 (emphasis added).

154. *Id.* at 316.

155. *Schuler-Zgraggen v. Switzerland*, 263 Eur. Ct. H.R. (ser. A) 7, 16 Eur. H.R. Rep. 405 (1993).

156. *Id.* at 430; *see also* *Salesi v. Italy*, 257 Eur. Ct. H.R. (ser. A) 54 (1993).

157. *Akdivar v. Turkey*, 1996-IV Eur. Ct. H.R. 1192 (1996), *reprinted in* 1 BUTTERWORTHS HUM. RTS. CASES 137 (1996).

158. *Feldbrugge v. The Netherlands*, 99 Eur. Ct. H.R. (ser. A) 2 (1986), 8 Eur. H.R. Rep. 425 (1986).

Deumeland v. Germany,¹⁵⁹ the Court extended the non-discrimination right to health insurance allowances.

The U.N. Human Rights Committee has also applied the integrated approach, using non-discrimination guarantees in Article 26 of the International Covenant on Civil and Political Rights to require unemployment benefits.¹⁶⁰ An integrated approach may also be inferred from the Human Rights Committee's elaboration on the "social dimension" of the right to life. In its *General Comments No. 6* on the right to life,¹⁶¹ the Committee noted the desirability for states to take "all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics."¹⁶²

Using the integrated approach in *Tavares v. France*,¹⁶³ the European Commission recognized that a public-health system falling below a certain minimum level of quality could be in breach of a state's obligation to protect the right to life under Article 2 of the European Convention. Although the Commission did not find the respondents liable, it clearly demonstrated that regulatory measures aimed at protecting life with regard to the hospital system are inherent in the Convention's protection of the right to life.¹⁶⁴

Following examples such as these, domestic courts, National Human Rights Institutions, the African Court, and the African Commission can creatively enforce ESCR through civil and political rights. Using this integrated and concerted approach, for instance, the right to health can be enforced through the right to life, for it is absurd to claim to have a right to life if the individual is so poor that she cannot afford the cost of adequate medical treatment to enable her to enjoy the right to life. It may also amount to unlawful and arbitrary deprivation of life¹⁶⁵ if the victim does not have access to adequate and sufficient medical facilities or treatment.¹⁶⁶

Likewise, the integrated and concerted approach can be used to enforce the right to education through the right to freedom of expression and the right to participate in the governance of one's country.¹⁶⁷ As a legacy of colonialism, African states conduct many affairs in official

159. *Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. A) 7 (1986), 8 Eur. H.R. Rep. 448 (1986).

160. *F. H. Zwaan-de Vries v. The Netherlands*, U.N. HUM. RTS. COMM., Communication No. 182/1984, Supp. No. 40, at 160, U.N. Doc. A/42/40 (1987).

161. *General Comment 6*, U.N. GAOR, 16th Sess., Annex 5, Supp. No. 40, U.N. Doc A/37/40 (1982), reprinted as Annex 3, in TEXTBOOK, *supra* note 36, at 454-55.

162. *Id.* at 454, ¶5.

163. *Tavares v. France*, App. No. 16593/90, Eur. Comm'n H.R. Dec. & Rep. (Sept. 12, 1991) (unreported), reprinted in Pellonpaa, *supra* note 151, at 865.

164. *See id.*

165. *See Afr. Charter*, *supra* note 2, at art. 4; *see also* FED. REP. NIG. CONST. § 33; REP. S. AFR. CONST. § 11.

166. *See Pellonpaa*, *supra* note 150, at 868-69 (arguing that right to life presupposes a certain minimum level of health services and that respect for private and family life under Article 8 of the European Convention may in certain circumstances oblige the state to provide housing to the homeless).

167. *See Afr. Charter*, *supra* note 2, art. 13(1).

languages that are different from the original language of the people in these states. Most states have laws imposing a minimum qualification as a precondition for aspiring to elective positions. In order to guarantee the political right to participation in governance, African institutions will need to ensure the right to acquire requisite qualifications and basic education.

For the same reasons, individuals could seek the right of equal access to state public services¹⁶⁸ based on the freedom from discrimination. After all, those who do not meet the imposed minimum qualifications for aspiring to elective offices due to inadequate educational opportunities are victims of state sanctioned discrimination. A state ought not to raise participatory thresholds to disbar some citizens when, at the same time, it cannot provide those who are likely to be disqualified with the enabling environment and facilities for meeting the threshold.

Enforcing a person's right to participate in government, to express herself freely, or to be free from discrimination in the foregoing instances would not necessarily obligate *de jure* the state to provide free education as such. Rather, it obligates the state not to deny its people participation, access, or other civil services implicated by the policies. However, it will quickly be apparent that *de facto* these rights require a minimum level of education, health, or other social services.

Using the integrated and concerted approach may avoid the obstacles posed by the ambiguity of the ESCR provisions of the African Charter. Rather than debating which of two or more possible interpretations is correct, this approach concentrates on the practical effectuation of the spirit and substance of the provision. Moreover, the integrated and concerted approach will be in keeping with the holistic, traditional African philosophy and conception of rights, the virtues of which are the "historical tradition and values of African civilization [that] inspire and characterize [the] reflection on the concept of human and peoples' rights" in the African Charter.¹⁶⁹

Evidently, the reach of this approach is limited in the sense that a victim who cannot fit her complaints within any of the justiciable provisions of civil and political rights is likely to be left without a remedy. Consequently, this approach is no replacement for a system of direct justiciability and enforcement of ESCR. Nor does this approach obviate the need to amend the African Charter to strengthen its normative and institutional framework.¹⁷⁰ To those proposed amendments should be added a change to the *Protocol* of the African Court to provide for direct individual access.¹⁷¹ It is not part of Africa's traditional heritage that a

168. See Afr. Charter, *supra* note 2, art. 13(2).

169. See Afr. Charter, *supra* note 2, at pmb., ¶ 5.

170. See Mutua, *African Human Rights Court*, *supra* note 72, at 358.

171. Article 34(6) of the Protocol renders the competence of the Court to accept cases directly from individuals dependent upon the consent of the State Party involved. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, art. 34, § 6, OAU/LEG/EXP/AFCHPR/PROT (III), adopted June 9, 1998, reprinted in 6 INT'L HUM. RTS. REP. 891 (1999). For a critique of this provision, see Mutua, *African Human Rights Court*, *supra* note 72, at 355.

person against whom a complaint is to be made must first give her consent. There is no good reason for a state to benefit from such a shield.

2. Minimum Threshold Approach

Commentators have described the Inter-American Commission's attempt to give effect to ESCR as the "minimum threshold approach."¹⁷² The term does not appear in the Convention.¹⁷³ The emphasis of this approach is on equal recognition and implementation of all human rights. As explained by Craven, "[r]ather than creating any *a priori* hierarchy of rights or emphasizing categorical differences in implementation, the minimum threshold approach advocates the necessity of action being taken across the board to ensure for all a minimum level of enjoyment of the whole range of human rights."¹⁷⁴

In 1980, the Commission determined that State Parties should "strive to attain the economic and social aspirations of its people by following an order that assigns priority to... the 'rights of survival' and 'basic needs.'"¹⁷⁵ In 1993, the Commission explained that the obligation to observe and defend human rights of individuals in the *American Declaration* and the *American Convention* "obligates [states], regardless of the level of economic development, to guarantee a minimum threshold of these rights."¹⁷⁶

As recognized by the Commission, the minimum threshold approach encapsulates a number of basic principles that are fundamental to the implementation of ESCR. Among other things, this approach calls for "the identification of the most deprived groups"¹⁷⁷ and demands "that in the creation and implementation of economic and social policies, states should place emphasis, as a priority, upon assisting the poorest and the most vulnerable in society."¹⁷⁸ In order to realize the minimum threshold, the Commission underscored the importance of "pay[ing] close attention to the equitable and effective use of available resources and the allocation of

172. See Bard-Anders Andreassen et al., *Assessing Human Rights Performance in Developing Countries: The Case for a Minimal Threshold Approach to Economic and Social Rights*, in HUMAN RIGHTS IN DEVELOPING COUNTRIES 1987/88, at 333 (Bard-Anders Andreassen & Asbjørn Eide eds., 1988).

173. See American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, OEA/ser. L/V/II.23, doc. 2 rev. 6, 1, O.A.S.O.R. OEA/ser. K./XVI/I.1, doc. 65 rev. 1 corr. 2 (1970), reprinted in 9 I.L.M. 673 (1970). But see Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. No. 69 (1988), OEA/Ser.L.V/II.82 doc.6 rev.1, 67 (1992), reprinted in 28 I.L.M. 156 (entered into force Nov. 16, 1999).

174. Matthew Craven, *The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 289, 317 (David J. Harris & Stephen Livingstone eds., 1998).

175. See INTER-AMERICAN COMM'N, ANNUAL REPORT 1979-80, at 152 (1980).

176. INTER-AMERICAN COMM'N, ANNUAL REPORT 1993, at 524 (1993).

177. Asbjørn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach*, 10 HUM. RTS. L.J. 35, 47 (1989).

178. Craven, *supra* note 174, at 318.

public expenditures to social programs that address the living conditions of the more vulnerable sectors of society"¹⁷⁹

The Commission's minimum threshold is in line with the jurisprudence of the U.N. Committee on ESCR. In its *General Comment No. 3*,¹⁸⁰ the Committee spoke of "a minimum core obligation" necessary to "ensure the satisfaction, at the very least, minimum essential levels of each of the rights."¹⁸¹ According to the Committee, the existence of resource constraints does not in any way eliminate State Parties' obligations to protect "the vulnerable members of society."¹⁸²

Although, for the most part, the Inter-American Commission's pronouncements hover in the region of the abstract, and the Commission has not put itself in a position to review claims of ESCR violations¹⁸³, the minimum threshold approach holds potential to advance the cause of ESCR. An effective human rights commission, whether national or regional, could utilize the approach to require state accountability for those policies, decisions, and practices that would diminish the provision of ESCR. A court or commission could invoke the approach to ensure that a State Party does not amass instruments of torture in the name of state security or spend excessively on defense while inadequately supporting measures to protect the health of the people. Considering the "equitable and effective use of available resources"¹⁸⁴, a court or commission could compel a government to justify its priorities, for instance where it chooses to embark on a prestige development project or construct a sports stadium while neglecting dilapidated health facilities.

Using the minimum threshold approach, the African Commission or the African Court could set up country-specific thresholds (or minimum core obligations) measured by indicators¹⁸⁵ to determine what amounts to "the best attainable state of physical and mental health" or "necessary measures to protect the health of their people."¹⁸⁶ In this way, what the government can or cannot afford can be independently verified and juxtaposed with other competing national priorities. This baseline approach could also be used to set up benchmarks to measure the "equity"

179. INTER-AMERICAN COMM'N, *supra* note 174, at 533.

180. Gen. Comment No. 3, U.N. COMM. ESCR, 5th Sess., Supp. No. 3, Annex III, U.N. Doc.E/1991/23 (1990). For a brief analysis of the Comment, see Scott Leckie, *An Overview and Appraisal of the Fifth Session of the U.N. Committee on Economic, Social and Cultural Rights*, 13 HUM. RTS. Q. 545, 562-65 (1991).

181. See U.N. COMM. ON ESCR, *supra* note 180, at ¶ 10.

182. *Id.* at ¶¶ 11-12.

183. See Craven, *supra* note 174, at 318.

184. Fairness and appropriateness of governmental actions and proposed or actual expenditures are implicated in the phrase "equitable and effective use of available resources." A creative and effective use of the minimum threshold approach will necessarily involve evaluating the fairness of a state's actions (*vis-à-vis* the most vulnerable group) and the appropriateness of its use (or allocation) of resources.

185. See Maria Green, *What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement*, 23 HUM. RTS. Q. 1062, 1065 (2001) (defining a human rights "indicator" as "a piece of information used in measuring the extent to which a legal right is being fulfilled or enjoyed in a given situation").

186. Afr. Charter, *supra* note 2, art. 16.

and "satisfaction" in "equitable and satisfactory working conditions."¹⁸⁷ With the aid of such indicators, it would be easier to ascertain or monitor when a state fails to fulfill its obligations.¹⁸⁸ Admittedly, fixing a minimum threshold is more of an administrative duty properly exercised by a non-judicial body like the Commission. Nonetheless, it is not inconceivable for a court to embark on such an exercise. A court can always encompass such an exercise within its notions of fairness and equity. After all, the category of fairness is never closed and can be expanded to embrace new situations.

One obstacle to a court-directed minimum threshold approach is that the allocation of resources is a policy matter properly left to the executive and legislature. The difference with respect to the courts' involvement in the minimum threshold approach would "be one of degree and not kind."¹⁸⁹ Courts frequently make decisions and orders based on public policy.¹⁹⁰ Lord Denning and Lord Diplock of the English Bench have revealed their consideration of policy issues in determining cases.¹⁹¹

Courts' decisions regularly impact the application of resources as well. Where the court finds the state liable for violating a citizen's right to personal liberty and awards damages for unlawful detention, such a decision implicates the state's application of resources. Where the court finds a state liable for failure to protect a citizen from counter-demonstrators while in the lawful exercise of her freedom of expression, it is unlikely that the state will prevail on a defense based on lack of resources to recruit and equip police officers. Although the threat of future damages will likely induce the state to increase funding for public safety, the court is not blamed for making decisions on the allocation of resources.

187. See Afr. Charter, *supra* note 2, art. 15.

188. See Andreassen et al., *supra* note 172, at 341 (noting that when the threshold approach is adopted "[t]he scope of violation of socio-economic rights would then refer to the percentage of the population not assured of this minimal threshold, in the first instance, and further involve the question of whether such failure of minimal threshold assurance is evenly or unevenly distributed by group, defined by ethnicity, race, occupation etc. . . ." (emphasis added)). Philip Alston appears to be making a case for the minimum threshold approach when he states:

The fact that there must exist such a [minimum] core [content of each right that cannot be diminished under any pretext]. . . would seem to be a logical implication of the use of the terminology of rights. In other words, there would be no justification for elevating a "claim" to the status of a right (with all the connotations that concept is generally assumed to have) if its normative content could be so indeterminate as to allow for the possibility that the rightholders possess no particular entitlement to anything. Each right must therefore give rise to an absolute minimum entitlement in the absence of which a state party is to be considered to be in violation of it[s] obligations.

Philip Alston, *Out of Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 352-53 (1987).

189. DAVID KINLEY, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: COMPLIANCE WITHOUT INCORPORATION 6-10 (1993) (internal citations omitted).

190. *Id.* at 6-10.

191. See *Magor & St. Mellons Rural Dist. Council v. Newport Corp.*, 2 All E.R. 1226, 1235-37 (1950) (illustrating Lord Denning's opinion); *Spartan Steel & Alloys v. Martin & Co. (Contractors) Ltd.*, 1 Q.B. 27, 36 (1973) (same); see also *O'Reilly v. Mackman*, 2 A.C. 237, 285 (1983) (illustrating Lord Diplock's opinion).

The minimum threshold approach, therefore, is not an entirely novel practice, but an extension of an already existing practice. Even if it were entirely new, this is no reason, by itself, to reject it. The courts are put in place to do justice. Justice must shift and adjust to cover new situations and the demands of the times. If the courts are not sufficiently equipped, they should be and the earlier the better.

The minimum threshold approach can reinforce the concerted and integrated approach and make it more effective. A court or commission could hold a State Party to be in violation of the right of an individual to "respect of the dignity inherent in a human being"¹⁹² where the individual has been made to live below the threshold set for the defendant State Party. In this way, it would be more difficult for a state or government to use lack of development as a defense, because its financial abilities would have been independently assessed and factored into its minimum threshold.

If these two approaches were combined effectively, it might be possible to provide greater, effective ESCR protection under the African Charter, even in the absence of direct national judicial enforcement. Regardless, the integrated and minimum threshold approaches should be a first step, and not the end game, in the overall effort to accord due, equal relevance to ESCR under the African Charter at both the national and regional levels.

VI. CONCLUSION

Human rights in Africa should be a quintessence of Africa's attempt to reclaim humanity following its devaluation by the most invidious abuses, especially the slavo-colonial, tentacular reach of some European states. Full reclamation of humanity entails *equal emphasis* on what it takes to be human. This equal emphasis translates into *equal enforcement* of all human rights, whether civil and political or ESCR, without discrimination. It requires a change of attitude towards ESCR in contemporary Africa. Protecting and enforcing only civil and political rights in a situation of exacerbated civil and political strife occasioned by worsening socio-economic conditions "projects an image of truncated humanity."¹⁹³ It "excludes those segments of society [the overwhelming majority] for whom autonomy means little without the [basic] necessities of life."¹⁹⁴ As the South African Constitutional Court underlined in *Grootboom*: "A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, equality and freedom."¹⁹⁵ The solution lies in adopting a truly holistic view of human dignity: one that is "pursued in light of both the overarching purposes and underlying values of human rights protection, rather than under the constraint of false

192. See Afr. Charter, *supra* note 2, art. 5.

193. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 29 (1992).

194. *Id.* (emphasis added).

195. *South Africa v. Grootboom*, 2000 (11) BCLR 1169, ¶ 44 (CC), available at <http://www.concourt.gov.za/judgments/2000/grootboom1.pdf> (last visited Feb. 2, 2002).

dichotomies.”¹⁹⁶

196. Craig Scott, *Reaching Beyond (Without Abandoning) the Category of “Economic, Social and Cultural Rights”*, 21 HUM. RTS. Q. 633, 664 (1999).